84-106

No. _____

Office-Supreme Court, U.S.
FILED
JUL 20 1984
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

CLAUS VON BULOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

DENNIS J. ROBERTS, II
Attorney General of the
State of Rhode Island

THOMAS M. DICKINSON
Special Assistant
Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

33 pp

QUESTIONS PRESENTED FOR REVIEW

1. When a private party seizes several pieces of evidence, subjects some of them to chemical testing and delivers the evidence to police, does the Fourth Amendment require police to obtain a warrant before conducting independent chemical tests?

2. If the police officer receiving pieces of physical evidence is aware that the defendant's privacy interest in the evidence has already been substantially compromised by private seizure, private examination and private chemical testing, does the Exclusionary Rule announced by this Court in *Mapp v. Ohio,* 367 U.S. 643 (1961), and modified in *United States v. Leon,* No. 82-1771 (U.S. July 5, 1984), require the suppression of the results of subsequent warrantless chemical analysis conducted by police?

3. Whether the trial court's refusal to suppress the results of warrantless chemical tests conducted by police on evidence that was privately searched, seized, examined, and chemically tested was harmless error?

4. Whether the judgment of the Rhode Island Supreme Court is supported by an adequate and independent state law basis?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES, STATUTES AND AUTHORITIES	iii
OPINION OF COURT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
I. FACTUAL BACKGROUND	1
A. FIRST COMA	2
B. CLAUS VON BULOW'S BLACK BAG	4
C. THE SECOND COMA	4
D. VON BULOW'S MOTIVE TO KILL HIS WIFE	6
II. FACTS REGARDING SEARCH ISSUE	6
A. THE PRIVATE SEARCH	6
B. PRIVATE CHEMICAL TESTS	7
C. TESTS BY STATE OFFICIALS	7
ARGUMENT	
I. THE WARRANTLESS CHEMICAL TESTS DID NOT VIOLATE THE FOURTH AMENDMENT.	10
II. THE EXCLUSIONARY RULE SHOULD NOT APPLY IN THIS CASE.	15
III. THE DENIAL OF THE MOTION TO SUPPRESS WAS HARMLESS ERROR.	20
IV. THE JUDGMENT OF THE RHODE ISLAND SUPREME COURT IS NOT SUPPORTED BY	

TABLE OF CONTENTS—Continued

Pages

AN ADEQUATE AND INDEPENDENT STATE LAW BASIS. 22

CONCLUSION 27

THE APPENDIX HERETO IS BOUND SEPARATELY IN ACCORDANCE WITH RULE 21.1.

TABLE OF AUTHORITIES

CASES

Abie State Bank v. Bryan, 282 U.S. 765 (1931) 23, 24

Arkansas v. Sanders, 442 U.S. 753 (1979) 11, 13

Burdeau v. McDowell, 256 U.S. 465 (1921) 10, 16

Chapman v. California, 386 U.S. 18 (1967) 20, 22, 25

Chicago B. & Q.R.R. Co. v. Illinois, 200 U.S. 561 (1906) 23

Commonwealth v. Varney, 391 Mass. 34 (1984) 2

Delaware v. Prouse, 440 U.S. 648 (1979) 27

Herb v. Pitcairn, 324 U.S. 117 (1945) 24

Mapp v. Ohio, 367 U.S. 643 (1961) 15

Massachusetts v. Sheppard, No. 82-963 (U.S. July 5, 1984) 15

Michigan v. Long, 103 S.Ct. 3469 (1983) 23, 24, 27

Murdock v. City of Memphis, 87 U.S. 590 (1873) 27

Nix v. Williams, No. 82-1651 (June 11, 1984) 2, 19, 20, 21, 26

People v. Adler, 50 N.Y. 2d 730, 409 N.E.2d 888 (1980) 2

Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924) 27

Schneble v. Florida, 405 U.S. 427 (1972) 21

TABLE OF AUTHORITIES—Continued

Pages

State v. Benoit, 417 A.2d 895 (R.I. 1980) 26

State v. Ortiz, No. 8636 (Hawaii May 23, 1984) 2

State v. von Bulow, — R.I. —, — A.2d —, (1984) 12, 13, 14, 24, 25, 26, 27

Stone v. Powell, 428 U.S. 465 (1976) 17

Sullivan v. Wainwright, 104 S.Ct. 450 (1983) 18

United States v. Jacobsen, 104 S.Ct. 1652 (1984) 2, 10, 11, 12, 13, 14, 15, 17

United States v. Barry, 673 F.2d 912 (6th Cir. 1982), cert. denied, 103 S.Ct. 238 (1983) 2

United States v. Leon, No. 82-1771 (U.S. July 5, 1984) 2, 15, 16, 17, 20

Weeks v. United States, 232 U.S. 383 (1914) 15

Williams v. Georgia, 349 U.S. 375 (1955) 23

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, sec. 2 1

U.S. Const. amend. IV 1, 22, 23, 25

U.S. Const. amend. XIV, sec. 1 ..... 1, 19

28 U.S.C. sec. 1257(3) 1

R.I. Const. art. I, sec. 6 ..... 1, 22, 25

R.I.Gen.L., Sec. 21-28-3.29 ..... 9, 16

MISCELLANEOUS AUTHORITY

Cameron & Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109 (1984) 19

Now comes the State of Rhode Island and Providence Plantations, by its attorney, and prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review said court's erroneous decision of federal constitutional questions.

OPINION OF COURT BELOW

The opinion of the Supreme Court of Rhode Island, as modified, is reproduced in Section A of the appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on April 27, 1984. A petition to reargue was timely filed on May 2, 1984. The petition to reargue was denied in an order dated May 24, 1984. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257(3) and by the Rules of the Supreme Court of the United States R. 17.1(b) (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following constitutional and statutory provisions involved in this case are set out in Section D of the appendix in accordance with Rule 21.1(f): U.S. Const. art. III, sec. 2; U.S. Const. amend. IV; U.S. Const. amend. XIV, sec. 1; R.I. Const. art. I, sec. 6; 28 U.S.C. sec. 1257(3).

STATEMENT OF THE CASE

I. Factual Background

Martha von Bulow lies comatose in a New York hospital: a silent, helpless victim of her unfaithful husband's

attempts to end her life, capture her fortune, and marry his mistress. A Newport, Rhode Island, jury convicted Claus von Bulow of twice attempting to murder his wife. Reviewing the record of von Bulow's trial, the Rhode Island Supreme Court found ample evidence that von Bulow had injected his wife on two occasions with potentially lethal doses of insulin, designed to induce her death and to free him to marry his lover. Despite their confidence in the evidence of von Bulow's guilt, the court held that the trial justice had erred in failing to suppress certain evidence as violative of von Bulow's Fourth Amendment rights. Although the offending evidence was largely cumulative, the court concluded that Fourth Amendment principles required reversal of von Bulow's conviction.

The State of Rhode Island, Petitioner herein, submits that the Rhode Island Supreme Court erred in reversing von Bulow's conviction. Petitioner suggests that the court decided important matters of federal law in a manner contrary to cases decided by this Court,[1] and in conflict with the decisions of the highest courts of other states and decisions of federal courts of appeals.[2] For the foregoing reasons, Petitioner prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review that court's erroneous decision of important federal constitutional questions.

A. *The First Coma.* During December of 1979, Martha von Bulow was celebrating the Christmas season with her

---

[1] *United States v. Jacobsen,* 104 S.Ct. 1652 (1984); *See United States v. Leon,* No. 82-1771 (U.S. July 5, 1984); *Nix v. Williams,* No. 82-1651 (June 11, 1984).

[2] *United States v. Barry,* 673 F.2d 912 (6th Cir. 1982), *cert. denied,* 103 S.Ct. 238 (1983); *Commonwealth v. Varney,* 391 Mass. 34 (1984); *People v. Adler,* 50 N.Y. 2d 730, 409 N.E.2d 888 (1980); *See State v. Ortiz,* No. 8636 (Hawaii May 23, 1984).

family at Clarendon Court, her Newport, Rhode Island vacation home. Present for the holidays were her husband, Claus von Bulow, (the Respondent herein); their daughter, Cosima; and Mrs. von Bulow's son and daughter by a previous marriage, Alexander von Auersperg and Annie Laurie (Ala) Kneissl. Maria Schrallhammer, Mrs. von Bulow's personal maid, was also in Newport that December. On December 26, 1979, Martha von Bulow suffered an unexplained coma. Alexander testified that he had sat with his mother that evening as she sipped holiday eggnog in the library at Clarendon Court. (Tr. VI-1021) Alexander noticed his mother's voice becoming weak and that she had difficulty walking. (Tr. VI-1020-1026) The young man helped his mother to her bedroom, where he told von Bulow of her problems. (Tr. VI-1027) Von Bulow left the room and returned with a drink for his wife. (Tr. VI-1028) When Alexander left his mother that evening, she was in her bedroom, conscious and talking with her husband. (Tr. VI-1030)

The next morning, Mrs. von Bulow's maid, Maria Schrallhammer, was surprised that her employer had not rung for breakfast by 9:30. (Tr. VIII-323) Von Bulow intercepted Maria and discouraged her from checking on his wife's condition. (Tr. VIII-325) When Maria's persistence resulted in her discovery that Mrs. von Bulow was unconscious and breathing with difficulty, Claus von Bulow refused to call a doctor. (Tr. VIII-327 to 330) Von Bulow finally spoke to the doctor in the afternoon. Maria overheard him misrepresenting his wife's symptoms and condition. (Tr. VIII-344) Mrs. von Bulow's local physician arrived in the early evening, finding his patient unconscious, barely breathing, and in need of mouth-to-mouth resuscitation. (Tr. VI-1040; VIII-346 to 348) After a brief stay at Newport Hospital, Mrs. von Bulow recov-

ered and returned to her year-round home in New York. (Tr. VI-1043) The cause of her December 1979 episode remained a mystery.

B. *Claus von Bulow's Black Bag.* Von Bulow's strange behavior—refusing at first to call for medical help and later reporting false symptoms—did not go unnoticed by his wife's maid, Maria Schrallhammer. (Tr. VIII-344, 369) A few months after the December 1979 incident, Maria was cleaning a closet in the von Bulow's New York apartment. (Tr. VIII-365) In one of Claus von Bulow's travel bags, she observed a small black bag containing pills, powders, and liquids. (Tr. VIII-367) Maria showed some of these items to Mrs. von Bulow's daughter, Ala, who arranged to have them chemically analyzed. (Tr. VIII-384) In November 1980, Maria again noticed the small black bag among Claus von Bulow's things. (Tr. VIII-386) On this occasion Maria saw a hypodermic syringe, several needles and a bottle labeled "insulin". (Tr. VIII-388 to 389) Confused by the presence of insulin, Maria summoned Alexander to show him her discovery. Maria again saw the black bag in December 1980 as she helped the family prepare to go to Newport for the holidays. Tr. VIII-391) This time the bag contained, in addition to the insulin and needles, a greenish liquid. (Tr. VIII-392)

C. *The Second Coma.* As Christmas of 1980 approached, a smaller group gathered at Clarendon Court. Ala was not present, having married that previous summer. Maria Schrallhammer was also absent. She had planned to accompany the family for the holidays, but Claus von Bulow had insisted that his wife's maid take a few days off and remain behind in New York. (Tr. VIII-406) On the evening of December 20, 1980, Alexander sat with his mother in the library at Clarendon Court as the two had

done the previous December. (Tr. VI-107) Von Bulow joined them briefly offering his wife a bowl of soup. (Tr. VI-1075) Alexander noticed that after his mother consumed the soup her voice became weak, much as it had a year earlier. (Tr. VI-1077) Attempting to stand, Mrs. von Bulow staggered. (Tr. VI-1079) Alexander once again helped his mother to her bedroom. (Tr. VI-1081) The young man summoned Claus von Bulow to alert him to his wife's condition. (Tr. VI-1081) Eventually Alexander left his mother and von Bulow conversing in the bedroom. (Tr. VI-1083)

The following morning, Maria's absence—effectuated by von Bulow's insistence that his wife's maid stay behind in New York—prevented her normal 9:30 a.m. check on her employer. Around 11:00 a.m., Alexander met von Bulow in the hallway and inquired about his mother's condition. (Tr. VI-1090) Von Bulow expressed surprise that his wife had not yet appeared for breakfast. (Tr. VI-1090) Von Bulow shortly summoned Alexander (Tr. VI-1091) into Mrs. von Bulow's bathroom, where the two men found her lying unconscious on the cold floor. (Tr. VI-1092) Von Bulow summoned emergency medical help, and his wife was again taken to Newport Hospital. (Tr. VI-1095) Unlike the previous year's incident, however, Martha von Bulow never recovered from her December 1980 coma. When Alexander von Auersperg testified in February, 1982, his mother remained hospitalized in an unconscious state.[3] (Tr. VI-994)

---

[3] At trial, Doctor George Cahill, a professor of medicine of Harvard Medical School and former Director of Boston's prestigious Joslin Research Laboratories, testified as an expert for the prosecution. (Tr. XIX-2679 to 2730). Doctor Cahill told the jury that based upon his expert knowledge of insulin and blood sugar, his examination of Martha von Bulow's medical history and records led to the conclusion that both of her comas were caused by infusions of exogenous insulin. (Tr. XIX-2714 to 2724).

D. *Von Bulow's Motive to Kill His Wife.* At trial, the prosecution offered evidence that von Bulow had attempted to kill his wife so that he could capture her fortune and marry his mistress. The evidence showed that if his wife died, von Bulow would inherit a substantial portion of his wife's formidable estate. Included in his inheritance would be Clarendon Court, the New York apartment, $2.5 million in cash, and annual interest from a $7.5 million trust principal. (Tr. XIX-2844-54) Alexandra Isles testified that she and von Bulow had fallen in love early 1979. (Tr. XVII-2170) In late spring of 1979, Mrs. Isles delivered an ultimatum: if von Bulow was serious about marrying her, he should "make the break" from his wife within six months. (Tr. XVII-2172) This ultimatum expired some time before Mrs. von Bulow's first coma. By November of 1980, shortly before his wife's second coma, von Bulow again proposed marriage to Mrs. Isles. He assured her of his intention to end his marriage to Mrs. von Bulow. (Tr. XVII-2185) Within a month the second coma occurred.

II. Facts Regarding Search Issue

A. *The Private Search.* Suspicious of von Bulow's involvement in his mother's condition, Alexander went with a private detective, Edwin F. Lambert, to Clarendon Court on January 23, 1981, to retrieve the black bag and its contents from von Bulow's closet. They found a set of keys in von Bulow's study, one of which opened the closet. Alexander discovered a vial in the desk and another in the pocket of a coat belonging to von Bulow. One of these vials was empty, the other contained a powder. (Tr. II-326, 418) Beneath a low shelf, on the floor of the closet, Lambert discovered an unlocked, black metal box containing the black bag. (Tr. II-324) Alexander examined the bag's contents discovering the following items:

one hypodermic syringe (Tr. II-470); three needles, two of which were sealed in plastic containers (Tr. II-425); two orangeish containers with white tops (Tr. II-423), one containing a blue-green liquid, the second containing a number of different pills (Tr. II-470-471); and ampoules in little plastic packages. (Tr. II-423) In addition, the pair found inside the metal box a cardboard box marked "Lidocaine". (Tr. II-423)

B. *Private Chemical Tests.* When Alexander returned to New York, he examined the black bag and its contents with Dr. Kuh. (Tr. VII-40, 41) Later, Alexander gave the items to his mother's personal physician, Dr. Stock, for analysis. (Tr. II-472) As a result of chemical tests conducted by the family before the police became involved, Mrs. von Bulow's private doctor learned that the needle found in the black bag had been encrusted with Insulin, Amobarbital and Diazepam (Valium). (Tr. XVII-2227, 2251) The powder found in von Bulow's pill vial was a preparation of Amobarbital. The blue-green liquid was a mixture of Amobarbital and Diazepam (Valium). (Tr. XVII-2251 to 2252) Both the liquid and the powder had been altered from the commercial state of pharmaceutical preparation. (Tr. XVII-2337) On the basis of this information, Dr. Stock felt compelled to contact police authorities. (Tr. XVII-2336)

C. *Tests by State Officials.* On March 13, 1981, Alexander met with Sgt. John F. Reise of the Rhode Island State Police. (Tr. IV-658) He gave the black bag to Reise and, in Reise's presence, removed the contents of the bag, which the policeman catalogued in accordance with department procedures. (Tr. IV-659) Reise knew that the contents of the bag had been visually examined by Alexander and others. (Tr. IV-667) He also knew that certain items had been chemically tested by private meth-

ods. (Tr. IV-667) He was unsure, however, which items had been tested. (Tr. IV-672) Thus, Sgt. Reise sent the liquid and the powder, which had previously been tested by Dr. Stock, to the state toxicologist for further testing. (Tr. IV-659 to 60) Among the other items found within the black bag was a prescription vial in the name of C. von Bulow and labeled "Dalmane". (Tr. IV-660) Reise noted that inside the vial were sixty-five pills of different varities. Thirty-one orange-yellow capsules were imprinted with the word "Dalmane". (Tr. XVI-2010) By referring to the *Physician's Desk Reference* (PDR), Reise confirmed the standard color and markings for Dalmane capsules. (Tr. IV-660) An additional 31 light blue tablets were imprinted with the words "Roche 10 Valium". (Tr. XVI-2011) Using the *PDR,* Reise confirmed the identity of these blue tablets as Valium. (Tr. IV-664) In addition, Reise found one blue capsule labeled "Lilly F33", which the *PDR* identified as Amytal, and one red capsule marked "Lilly F40", which the *PDR* identified as Seconal. (Tr. IV-664) Reise sent one each of these pills to the state toxicology lab, together with a clear glass ampoule labeled "Papaveretum" and the Lidocaine which had been in a cardboard box outside the black bag. The State toxicology analysis confirmed the accuracy of the private chemical tests and Sgt. Reise's plain view identification in all respects save one.[4] The red capsule labeled "Lilly F40", had been identified by the PDR as Seconal. Chemical analysis revealed the presence of Secobarbital, Amobarbital and Cyclizine.

Before Sgt. Reise ordered any state toxicological test, each and every item related to the black bag had already

---

[4] The results of the private chemical test, plain view identification, and state toxicology test are collected in tabular form in section F of the Petitioner's Appendix. App. F, at 87.

been fully identified either by the strictly private chemical analysis (needle, powder, and blue-green liquid); by the reading of labels as Alexander had done (Dalmane, Lidocaine, and Papaveretum); or by plain view observation in connection with the *PDR* (Dalmane, Valium, Amytal, Seconal). Moreover, Reise knew that in the form they were possessed, some of the items sent for testing were contraband. *See* R.I.Gen.L., Sec. 21-28-3.29 (controlled substances may not be possessed except in original container).

Before trial, von Bulow sought to suppress the black bag, its contents and results of all chemical tests conducted by private parties and public officials. The trial justice conducted lengthy evidentiary hearings. (Tr. II-189 to IV-673) Claiming that private parties had seized the evidence illegally, von Bulow argued that the Fourth Amendment required suppression. (Tr. IV-687) The trial judge orally denied the motion, holding that the Fourth Amendment had no application to the conduct of private parties. (Tr. IV-704) Moreover, the court reasoned that further testing by police was neither a search within the meaning of the Fourth Amendment nor unreasonable. (Tr. IV-729) On appeal, von Bulow raised the private search and state chemical tests as violative of his Fourth Amendment rights. *See* Appellant's Brief at 53. The Rhode Island Supreme Court agreed that the initial private seizure and private chemical testing were beyond constitutional scrutiny. With regard to police chemical tests, however, the court reasoned that these tests constituted an independent search that should not have been conducted without a warrant. The court held that the Fourth Amendment compelled reversal of von Bulow's conviction.[5]

---

[5] See App. A for remaining issues discussed by the court.

ARGUMENT

I. The Warrantless Chemical Tests Did Not Violate the Fourth Amendment

This Court first discussed the applicability of the Fourth Amendment to private searches and seizures in *Burdeau v. McDowell,* 256 U.S. 465 (1921). This Court reasoned that the seizure of evidence by private individuals—even if wrongful—was outside the scope of the Fourth Amendment Exclusionary Rule. *Id.* at 476. More recently, this Court has considered the propriety of police examination and testing of items initially seized or searched by private parties.

In *United States v. Jacobsen,* 104 S.Ct. 1652 (1984), this Court held that in measuring the reasonableness of police conduct, a court must view the facts as they existed at the time an official invasion occurred. *Id.* at 1657. To the extent that private search activity frustrates an expectation of privacy, government conduct coextensive with the private activity triggers no Fourth Amendment scrutiny. Moreover, the reasonableness of further governmental activity will be measured by the degree to which it exceeded the scope of prior private conduct. *Id.* at 1657. Whatever a defendant's subjective hope for secrecy, only those expectations of privacy that "society is prepared to consider reasonable" merit Fourth Amendment protection. *Id.* The Court reasoned that a chemical test for the presence of cocaine—the possession of which can never be legitimate—compromises no legitimate expectation of privacy. *Id.* at 1662. Thus, the Court concluded that the chemical test conducted in *Jacobsen* infringed no constitutionally protected privacy interest. *Id.* at 1663.

In this case, the initial "government invasion" occurred when the black bag and its contents were deliv-

ered to Sgt. Reise. The presence of insulin, Amobarbital and Diazepam (Valium) on the used needle had been exposed by Dr. Stock's private chemical tests. (Tr. XVII-2227, 2251) The identity of the blue-green liquid and the powder had been revealed as pharmaceutically altered preparations of Amobarbital and Diazepam (Valium). (Tr. XVII-2251 to 52, 2337) Subsequent state toxicology analysis of these items neither expanded upon the private search nor impinged any remaining expectation of privacy. *See Jacobsen,* 104 S.Ct. at 1658 (once frustration of original privacy interest occurs, Fourth Amendment permits government use of now non-private information).

The remaining items had never been privately chemically tested. Nevertheless, von Bulow's remaining expectation in their privacy had been substantially vitiated by the items themselves and by private conduct with respect to them. *Cf. Jacobsen,* 104 S.Ct. at 1660 (police had already learned "a great deal" about package prior to chemical test). First, the Lidocaine, Papaveretum, Dalmane and Valium bore markings declaring their identity, fully visible to Alexander when he examined the contents of the black bag. Items that are visually identifiable, like the proverbial gun case, *Arkansas v. Sanders,* 442 U.S. 753, 764 n.13 (1979), can scarcely support any measurable expectation of privacy. The item itself is fully admissible and the jury would certainly be free to read its label. The likelihood that subsequent chemical analysis of these items "will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen,* 104 S.Ct. at 1662. The other items contained in the black bag—one blue "Lilly F33" capsule, and one red "Lilly F40" capsule—had also been visually examined by Alex-

ander and Dr. Kuh. (Tr. VII-40, 41) Von Bulow's trial counsel conceded that the Fourth Amendment did not preclude Sgt. Reise from identifying these items via the *PDR*[6]. No supportable expectation of privacy remained as a bar to chemical analysis of these items. Thus, the subsequent state toxicology test violated no expectation of privacy that society is prepared to recognize as reasonable.

The analysis advocated above contrasts sharply with the voyage embarked upon by the Rhode Island Supreme Court. Rather than examining von Bulow's privacy interest as it existed at the initial government intrusion, 104 S.Ct. at 1657, the Rhode Island Supreme Court eschewed *Jacobsen's* principles[7] in favor of von Bulow's original expectation of privacy in his locked closet. App. A at 45. The von Bulow court ignored the fact that several of the items were clearly labeled and could therefore support no colorable expectation of privacy. Moreover, in its zeal to avoid the mandate of *Jacobsen* the Rhode Island court refused to recognize defense counsel's concession that Sgt.

---

[6] "MR. FAHRINGER [defense counsel]: In the context of this case, your Honor, I agree, because *Walter* really makes this clear. Had the officers in this case merely taken the material and looked at it and said 'Hm, that's Dalmane. That's Valium,' maybe even gone to the Physicians' Desk Reference and verified those things, that would have been fine. I have to say in all candor, they would have not gone beyond the scope of the private search." (Tr. IV-723).

[7] This Court decided *United States v. Jacobsen* on April 2, 1984, 104 S.Ct. 1652 (1984). *State v. von Bulow* had been argued in October of 1983. Accordingly, the Rhode Island Supreme Court's treatment of *Jacobsen* was without the benefit of oral argument or extensive briefing. Although both parties did provide cursory supplemental correspondence regarding *Jacobsen, see* Section E. of Petitioner's Appendix, the important *Jacobsen* opinion never received the careful discussion that normally occurs in appellate briefs and arguments. This matter was raised, to no avail, in the state's petition to reargue *See* App. B, at 64.

Reise was free to identify items in the black bag by use of the *PDR*.

Furthermore, the Rhode Island Supreme Court ignored the objective reasonableness of the test at its inception. Instead, the court fastened upon the subjective test results that showed that one red capsule's chemical identity did not conform to Sgt. Reise's plain view identification. This approach contravenes the caveat in *Jacobsen* that the reasonableness of chemical testing is never dependent upon the results of a particular test. 104 S.Ct. at 1662. Moreover, the *von Bulow* court's result-oriented approach is simply illogical. The Rhode Island Supreme Court would invalidate a search which, although reasonable at its inception, produced surprising results. A labeled pill capsule openly declares the nature of its content; it cannot support any reasonable expectation of privacy. This Court has noted that:

> some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view", thereby obviating the need for a warrant." *Arkansas v. Sanders,* 442 U.S. 753, 764 n.13

Cf. Jacobsen, 104 S.Ct. at 1661 (distinguishing subjective hope for secrecy from protected expectation of privacy; Fourth Amendment protects only latter). Examination of a labeled capsule's contents is reasonable at its inception and violates no Fourth Amendment interest—even if the results of that examination conflict with the examiner's expectation. *See Jacobsen,* 104 S.Ct. at 1662 (propriety of chemical test is not contingent upon results of test).

In rejecting *Jacobsen,* the *von Bulow* court misperceived the facts as they existed when Alexander delivered

the black bag to Sgt. Reise. *See United States v. Jacobsen*, 104 S.Ct. at 1657 (police conduct must be viewed in light of facts at time police acted):

1. von Bulow had secreted in a locked closet a suspicious black bag known to contain a syringe, needles and a variety of drugs;
2. private chemical tests revealed that a used needle within the black bag contained traces of Insulin, Amobarbital and Diazepam;
3. private analysis also revealed the presence of pharmaceutically altered preparations of Amobarbital and Diazepam;

From this evidence, the inferences of von Bulow's criminal conduct were overwhelming, unlike *Jacobsen* where police conduct regarding the seized items was essential to the determination that any crime had been committed. Moreover, in focusing upon the subjective importance of the state toxicology report rather than the degree to which it exceeded the scope of prior conduct, the court misapplied this Court's definition of "significant expansion".[8] Public conduct significantly expands upon prior

---

[8] The Rhode Island Supreme Court candidly exposed its own carelessness with regard to the relationship between the state toxicology report and von Bulow's expectation of privacy. In response to the state's petition to reargue, see App. B, the court admitted that the court's original opinion had misstated the facts regarding one particular pill analyzed by the state toxicologist:

> "Concededly, this particular pill was obtained by the State Police on April 21, 1981, while searching with defendant's consent, the family's Newport home." *State v. von Bulow*, No. 82-462-C.A. (May 24, 1984 order), App. C., at 68.

That such a factual error could have appeared in the court's opinion reinforces the Petitioner's argument that the court failed to consider von Bulow's actual expectation of privacy in measuring the conduct of the police. *See United States v. Jacobsen*, 104 S.Ct. at 1657, 1660 (fact that defendant's privacy has been substantially compromised prior to police action is highly relevant to reasonableness of police conduct).

private conduct only when it impinges upon a remaining expectation of privacy that society is prepared to recognize as reasonable. *Jacobsen,* 104 S.Ct. at 1661. Von Bulow's remaining expectation of privacy in the contents of pill capsules that were plainly identifiable by label can only be described as marginal. *See Jacobsen,* 104 S.Ct. at 1662. Under such circumstances "the safeguards of a warrant would only minimally advance Fourth Amendment interests." *Jacobsen,* 104 S.Ct. at 1663. Petitioner submits that the warrantless chemical test was therefore reasonable, *id.,* and the trial judge correctly refused to suppress the state toxicology results. Accordingly, the judgment of the Rhode Island Supreme Court must be reversed.

II. The Exclusionary Rule Should Not Apply In This Case

This Court announced the Fourth Amendment Exclusionary Rule in *Weeks v. United States,* 232 U.S. 383 (1914), and *Mapp v. Ohio,* 367 U.S. 643 (1961). The Court has recently recognized that the philosophical underpinnings of the exclusionary rule sometimes will not support its application to exclude reliable, probative evidence obtained in technical violation of the Fourth Amendment. *Massachusetts v. Sheppard,* No. 82-963 (U.S. July 5, 1984); *United States v. Leon,* No. 82-1771 (July 5, 1984). The principles endorsed in *Sheppard* and *Leon* suggest that the application of the exclusionary rule in this case is inappropriate.

In *Leon,* this Court recognized that adherence to the truth-finding role of judges and jurors sometimes requires that the propriety of the exclusionary sanction be measured in light of the magnitude of the alleged police misconduct:

> "Particularly when law enforecement officers have acted in *objective good faith or their transgressions*

> *have been minor*, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *Id.* slip op. at 8. (emphasis added)

Any transgressions that occurred in this case were minor. Moreover, Sgt. Reise acted in objective good faith in sending the contents of the black bag to the state toxicologist. Accordingly, Petitioner suggests that the exclusionary rule should not be applied in this case.

This Court recognized in *Leon* that the purpose of the Fourth Amendment exclusionary rule is to deter official misconduct. *See id.*, slip op. at 7. The Court reasoned that as with all remedial devices, the rule ought to be tailored appropriately to attain its objectives. In cases, therefore, involving substantial and deliberate Fourth Amendment violations, the application of the rule remains unchecked. In *Leon* the Court concluded that police had relied in good faith on an apparently valid warrant. *Id.* at 14. The warrant was later determined to be improper. The Court reasoned that when evidence has been seized in the reasonable good faith belief that the seizure was permissible, a proper balance suggests that the exclusionary rule should be relaxed. *Id.* at 9.

An examination of the facts as they existed when Sgt. Reise first ordered a toxicology analysis, *Jacobsen*, 104 S.Ct. at 1657, reveals that his belief that no warrant was necessary was bona fide and reasonable. First, Sgt. Reise knew that the black bag had been seized by private parties. (Tr. IV-670 to 672) Such a seizure could not violate the Fourth Amendment. *E.g., Burdeau v. McDowell, supra.* Sgt. Reise was also aware that Alexander von Auersperg had examined the contents of the bag and that private chemical tests had been conducted on several items. (Tr. IV-670 to 672) Remaining items in the bag were identifiable by plain view examination in connection with the

PDR. In the form possessed, some of the items were contraband. R.I. Gen. L. Sec. 21-28-3.29. Based on this state of affairs, Sgt. Reise reasonably concluded that no warrant was necessary to conduct chemical analysis of the contents of the black bag. The trial judge agreed with Sgt. Reise holding that the policeman's conduct was neither unreasonable nor violative of the Fourth Amendment. (Tr. IV-729) Sgt. Reise's conduct unquestionably passes the *Leon* test for objective good faith. *Leon* at 8-9.

In addition to satisfying *Leon's* good faith requirement, Sgt. Reise's conduct qualifies for the *Leon* exception because any transgression of the Fourth Amendment by Sgt. Reise's bona fide conduct can only be described as minor. *Id.* The black bag and its contents were fully exposed to Sgt. Reise by virtue of private activity. Private chemical tests had revealed the insulin encrusted needle (the most incriminatory evidence against von Bulow) and the identity of other items connected to von Bulow and the black bag. Remaining items within the black bag were fully identifiable simply by reading their labels or by plain view in connection with the *PDR.*[9] The likelihood that testing of these items by the state toxicologist would compromise any remaining legitimate expectation of privacy "seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen,* 104 S.Ct. at 1662.

This Court must weigh Sgt. Reise's objective good faith and the minor nature of any potential Fourth Amendment transgression against the substantial societal costs exacted in reversing von Bulow's conviction. *See Leon,*

---

[9] Von Bulow's trial counsel conceded that such conduct was permissible under the Fourth Amendment. Note 6 *supra.*

slip op. at 8-9; *Stone v. Powell*, 428 U.S. 493, 494-95 (1976). The trial of this case consumed six weeks of precious judicial time. The impact of any Fourth Amendment violation on the original trial can only be described as marginal.[10] An examination of the evidence remaining after suppression reveals the essentially cumulative nature of the state toxicology report and a concomitant absurdity in the application of the exclusionary rule to require a new trial in this case. The physical items of evidence—the black bag and its contents—remain fully admissible. The Rhode Island Supreme Court correctly concluded that the seizure of these items by private parties implicates no Fourth Amendment rights. The highly probative evidence regarding an insulin encrusted needle will therefore reach the jury at a second trial. The jury will be free to read the labels on those items that declare their contents. In addition, the liquid and the powder were fully identified by private analysis, and these results must also reach the jury without Fourth Amendment objections. Von Bulow has conceded that the remaining items—the blue amytal capsule and the red seconal capsule—may be identified by reference to the *PDR*. Because the state toxicology analysis revealed for the first time that the red capsule had been altered, conceivably this fact may be kept from the jury at a second trial. The fact that other drugs within the black bag had been mixed or altered from their state of pharmaceutical preparation, however, will be admissible as a result of the private chemical analysis. Thus, virtually,

---

[10] Petitioner is, of course, confident of the evidence of von Bulow's guilt. Reviewing the record, The Rhode Island Supreme Court found ample admissible evidence to support the jury's verdict. Viewed in this light it seems highly likely that von Bulow would be convicted again on retrial. In measuring the societal cost of the exclusionary rule this Court should not be unmindful of the effect of such a retrial on all actors—even the defendant. As Chief Justice Burger has sug-

(Continued on Next Page)

every piece of information that came before the jury as a result of the state toxicology test will be fully admissible by collateral means on retrial. A new trial would do nothing whatever to promote the integrity of the judicial process, but would inflict a wholly unacceptable burden on the administration of criminal justice. *Nix v. Williams* slip op. at 14.

Another potential occurrence at retrial is the possibility that von Bulow will testify for the first time in his own defense. If he does so he will presumably claim—in accordance with his position at trial and on appeal—that the black bag and its contents never belonged to him. Of course, if von Bulow eschews a possessory interest in the black bag his standing to assert Fourth Amendment rights evaporates. Under this scenario the application of the exclusionary rule to vacate his present convictions would be especially perverse.

Finally, in weighing the social cost of applying the exclusionary rule to this case, the victim must not be ignored. The societal benefit of vindicating Claus von Bulow's marginal privacy interest pales in comparison to the societal cost if Martha von Bulow's attacker escapes justice:

> "The rhetoric of some civil libertarians to the contrary, it *is* worse to be murdered or raped than to have one's house searched without a warrant, no matter how aggravated the latter violation." Cameron & Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109, 145 (1984).

(Continued from last page)

gested, guilty defendants sometimes suffer an additional measure of cruelty when their inevitable punishment is delayed by continuous litigation based on hopeless legal technicalities. *Sullivan v. Wainwright*, 104 S.Ct. 450, 452 (1983) (concurring opinion by Burger, C.J.).

If Martha von Bulow were conscious, no doubt she would speak volumes about the events of December 21, 1980. Despite her present medical condition, Mrs. von Bulow, like all citizens, is entitled to equal protection of the laws. U.S. Const., Amend. 14. Reversal of her attacker's conviction on the basis of a marginal invasion of his barely visible privacy interest raises serious questions about our judicial system's ability to fulfill that promise. A balance of the benefits and costs of the exclusionary rule reveals marginal benefit while creating a substantial risk of general disrespect for the law and the administration of justice. *Leon, supra* slip op. at 8.

Petitioner submits that the exclusionary rule should not be applied in this case.

III. The Denial of the Motion To Suppress Was Harmless Error

This Court has recognized that when small errors or defects have little effect on the result of a trial, they should properly be regarded as harmless:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position than they would have been in if no police error or misconduct had occurred." *Nix v. Williams,* No. 82-1651 (U.S. June 11, 1984), slip op. at 10 n.4. (emphasis in original)

The Court has also held that when an error of constitutional magniture occurs, the error will be considered harmless upon a showing that it was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). Of course, objectionable evidence that has a source independent of any police misconduct must be exempted from harmless error computation, because the information reached the jury free of constitutional taint.

See Nix slip op. at 10. Thus, in measuring the harm resulting from the alleged error, the Rhode Island Supreme Court should have considered those pieces of information that were learned only as a result of the warrantless chemical test. *See* App. F at 87 (summarizing test results in tabular form).

Independent of the state test the jury heard overwhelming evidence on von Bulow's guilt. Information regarding his desire to terminate his marriage, his questionable conduct surrounding both comas, his suspicious possession of insulin and other drugs, and the insulin encrusted needle all came before the jury independent of the state toxicology test. The only new fact that the jury learned from the state toxicologist was that one red capsule had been tampered with. Clearly, from this evidence the jury could have inferred that von Bulow had tampered with the drugs in his black bag. This information was essentially cumulative of the fact, revealed by the permissible private tests, that other items in the black bag had also been pharmaceutically altered. Had the red capsule's contents been kept from the jury there would be little likelihood of a different result at trial. *See Nix* slip op. at 10 n.4.

It can scarcely be contended that the jury would have found the prosecution's case "significantly less persuasive" without the test of the red capsule. *See Schneble v. Florida,* 405 U.S. 427, 432 (1972). The Rhode Island Supreme Court, however, rejected the prosecution's harmless error analysis without considering the collateral admissibility of most of the evidence contained in the state toxicology report. The court focused instead upon the general importance of chemical tests to prove that von Bulow had possessed various drugs and may have used them on his wife. Ample evidence independent of the State toxicology

test was introduced to prove this fact. In sum, virtually every piece of information contained in the state toxicology report is admissible by independent means. Any error that occurred in the trial court's refusal to suppress these results must be deemed harmless beyond a reasonable doubt. Because the Rhode Island Supreme Court erred in finding harmful error, the court's judgment must be reversed.

IV. The Judgment of The Rhode Island Supreme Court is Not Supported by An Adequate and Independent State-Law Basis

In his appeal to the Rhode Island Supreme Court, von Bulow argued that the private search violated the Fourth Amendment and Article I, section 6 of the Rhode Island Constitution. The court concluded that the trial justice had erred in failing to suppress the toxicology report. The court analyzed further to determine whether this constitutional error was "harmless beyond a reasonable doubt," applying the standard announced by this Court in *Chapman v. California,* 386 U.S. 18, 23-24 (1967). The court concluded that adherence to Fourth Amendment principles required reversal of von Bulow's conviction. App. A at 34. The court noted in addition that Art. I, Section 6 of the Rhode Island Constitution presented an adequate and independent basis for the decision to suppress the evidence contained in the state chemical report. App. A at 47. The Petitioner recognizes that the Rhode Island Supreme Court's citation of the state constitution gives rise to an inference that the court's judgment is supported by state law. Nevertheless, Petitioner claims that this portion of the Court's opinion is dependent upon the court's federal law analysis and that the state law theory cannot stand alone to support the court's judgment. Accordingly,

the Petitioner claims that this court has jurisdiction to review the federal constitutional errors complained of.

This Court's application of the "adequate and independent" theory has not been without difficulty. Surveying the law in 1983, Justice O'Connor observed:

> "Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue." *Michigan v. Long,* 103 S.Ct. 3469, 3474 (1983).

In *Long* the Supreme Court of Michigan had invalidated a protective search of the passenger compartment of a vehicle, purporting to rest its decision on the Fourth Amendment and Article 1, sec. 11 of the Michigan Constitution.

This Court recognized that the state court's citation to its own constitution presented a question whether the state court's decision was supported by adequate and independent state law theories. *Id.* at 3474.[11] The Court noted initially that the question whether a state court's judgment rests upon adequate and independent grounds is

---

[11] In cases involving federal constitutional issues a state court may not insulate itself from review by mere citation to state laws that are not legally sufficient to support its judgment. *Williams v. Georgia,* 349 U.S. 375, 399 (1955) (Clark, J., dissenting); *Chicago, B. & Q.R.R. Co. v. Illinois,* 200 U.S. 561 (1906).

This Court will examine the lower court's opinion to determine whether the alleged state law basis in fact supports the state court's judgment:

> "[T]he federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryon,* 282 U.S. 765, 774 (1931).

an issue of federal law that this Court must resolve for itself. *Id.* The Court candidly admitted that the manner in which this inquiry had historically been conducted was less than satisfactory. The Court announced a rule to apply to cases involving state and federal issues:

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the State court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3476.

In applying this test to the *Long* case, the Court concluded that the state court's judgment rested primarily upon federal law. *Id.* at 3477. Citation to the state's own constitution was insufficient support for the Michigan Court's judgment. Accordingly, this Court proceeded to consider the merits of the federal issues presented in the case.

The Petitioner does not dispute that the *opinion* of the Rhode Island Supreme Court offered an alternative basis for the suppression of evidence in this case. This Court, however, is empowered to review judgments, not opinions. *Herb v. Pitcairn,* 324 U.S. at 126. Accordingly, the Petitioner focuses upon the *judgment* entered by the *von Bulow* Court. The Rhode Island Supreme Court vacated the judgment of conviction and remanded the case for a new trial. It is the province of this Court to examine and to correct state court judgments "to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945). The fundamental question is "whether the asserted non-federal ground *supports the judgment.*" *Abie State Bank v. Bryan,* 282 U.S. 765, 773

(1931) (emphasis added). By comparing the *von Bulow* court's discussion of federal issues with its state law analysis, it becomes clear that the Rhode Island Supreme Court failed to undertake the analyses necessary to supports its judgment with state constitutional theory.

The *von Bulow* court, in its federal law section, concluded that the conduct of private parties is outside the reach of the Fourth Amendment. The court next considered the conduct of police authorities in testing certain items recovered by the private search. Defects in the court's Fourth Amendment analysis are discussed elsewhere in this petition. Suffice it to say, the logic and reasoning of the court's constitutional discussion led the court to conclude that von Bulow was entitled to a new trial free of the illegally obtained evidence. In essence, the court undertook a two-pronged analysis. One part of the analysis involved the conclusion that the warrantless toxicology test violated the Fourth Amendment and that the trial judge committed error in refusing to suppress. The other prong of the anlysis resulted in the conclusion that this error was sufficiently harmful to von Bulow to require reversal of his conviction. In applying a harmless error analysis to the facts of the case, the court referred to *Chapman v. California,* 386 U.S. 18, 23-24 (1967). Reasoning that the evidence in this case failed the *Chapman test,* the court rejected the state's harmless error argument. Having found a Fourth Amendment violation that could not be considered harmless error, the court concluded that "defendant's conviction must be reversed." App. A at 47.

An examination of the Rhode Island Supreme Court's state constitutional analysis reveals that the court never concluded that the state constitution required reversal of

von Bulow's conviction. The court noted first that Article 1, section 6, of the Rhode Island Constitution provides special protection to the privacy of citizens of Rhode Island. The court went on to conclude that the trial justice had erred, under state constitutional principles, in refusing to suppress the evidence. App. A at 51. Of course, this conclusion alone is insufficient to support the court's judgment of reversal. The Rhode Island Supreme Court has previously held that errors of state constitutional dimension will require reversal only when harmful to the defendant. *State v. Benoit,* 417 A.2d 895 (R.I. 1980). Moreover, in analyzing state constitutional issues, the Rhode Island court eschews the *Chapman* "beyond reasonable doubt" standard in favor of a more relaxed standard. *Id.* at 901. In analyzing the state constitutional error, however, the court in *von Bulow* never applied any harmless error standard.

The Petitioner submits that without any analysis to determine the effect of the alleged state constitutional error on the jury, principles of state law cannot support the reversal of von Bulow's conviction. A judgment of reversal requires two findings. First, the court must find that an error occurred. Second, the court must determine that the error was harmful. Both of these steps are necessary to assure that convictions are set aside only for errors that have a measurable effect on the trial. *See Nix v. Williams, supra,* slip op. at 10 n.4. The *von Bulow* court identified an error of state constitutional law, but never took the second necessary to require reversal. The court neither analyzed nor concluded that the state constitutional error was harmful. Absent a harm analysis, the state law issue is *inadequate* to support the judgment of reversal. Von Bulow will undoubtedly argue that the harmless error

analysis undertaken by the state court in its discussion of federal law adequately resolved this issue. Such an argument, however, renders the state constitutional analysis *dependent* upon the court's determination of federal constitutional issues. Where a state court's disposition of state law issues is interwoven with matters of federal law or compelled by the state court's interpretation of federal law, this Court has consistently held that there is no bar to a full review of the federal constitutional issues raised. *See, e.g., Michigan v. Long,* 103 S.Ct. 3469, 3476 (1983) (where state issue interwoven with federal issue, Supreme Court may determine federal questions); *Delaware v. Prouse,* 440 U.S. 648, 653 (1979) (when state court's resolution of state law depends upon federal issues, Supreme Court has jurisdiction to review case); *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109 (1924) (state law issue is not insulated from federal review if state court felt compelled by interpretation of federal law); *Murdock v. City of Memphis,* 87 U.S. 590 (1873) (Supreme Court will review state court decisions when state law is not sufficient to support judgment).

The Petitioner submits that the state law issue in this case is inadequate to support the judgment of the Rhode Island Supreme Court. Accordingly, this Court has jurisdiction to correct the important errors of federal law made by the Rhode Island Supreme Court.

CONCLUSION

The Rhode Island Supreme Court found substantial evidence that Claus von Bulow had twice attempted to murder his wife by injecting her with potentially lethal doses of insulin. Despite its confidence in von Bulow's

guilt, the Court invoked the Fourth Amendment exclusionary rule to reverse von Bulow's conviction. In doing so, the *von Bulow* court misconstrued this Court's applicable case law. Moreover, the court gave an unduly broad application to the exclusionary rule, despite this Court's concern that the exclusionary remedy be carefully tailored to suit the goal of deterring police misconduct. This overreaching application of the exclusionary rule constitutes a disservice to the victim and the parties in this case while creating a substantial risk of public disrespect for law and the administration of justice. For these reasons, the judgment of the Rhode Island Supreme Court must be reversed. The Petitioner prays that writ of certiorari issue to the Supreme Court of Rhode Island to review that Court's erroneous decision of federal constitutional issues.

STATE OF RHODE ISLAND

By its Attorney

DENNIS J. ROBERTS, II
Attorney General

THOMAS M. DICKINSON
Special Assistant
Attorney General
72 Pine Street
Providence, RI 02903

84-106

Office Supreme Court, U.S.
FILED
JUL 20 1984
ALEXANDER L. STEVAS,
CLERK

No. .....

In The
Supreme Court of the United States
October Term, 1984

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

CLAUS VON BULOW,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DENNIS J. ROBERTS, II
Attorney General of the
State of Rhode Island

THOMAS M. DICKINSON
Special Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

10 pp

GUIDE TO APPENDIX

A. Opinion of Rhode Island Supreme Court 1

B. Petition to Rhode Island Supreme Court for Reargument 59

C. Order of Rhode Island Supreme Court Denying Reargument 68

D. Constitutional and Statutory Provisions Involved 70

E. Post-argument Correspondence to Rhode Island Supreme Court regarding *United States v. Jacobsen*, 104 S.Ct. 1652 (1984) 72

F. Summary of Test Results 87

APPENDIX A

April 27, 1984
Supreme Court
No. 82-462-C.A.

No. 0311e

State of Rhode Island
and Providence Plantations

State	:
v.	:
Claus von Bulow.	:

OPINION

MURRAY, J. This is an appeal by the defendant, Claus von Bulow, from a Superior Court conviction on two counts of attempting to murder his wife, Martha von Bulow. The indictment was handed down by a Newport County grand jury on July 6, 1981, charging the defendant with two separate counts of assault with intent to murder his wife. The trial commenced in Newport on February 2, 1982, before a justice of the Superior Court and a jury. On March 16, 1982, after six days of deliberation, the jury found the defendant guilty on both counts.

The defendant moved for a judgment of acquittal and a new trial. These motions were denied by the trial justice on March 17 and April 2, 1982, respectively. On May 7, 1982, defendant was sentenced to ten years at the Adult Correctional Institution on the first count and twenty years at the Adult Correctional Institution on the second count, these sentences to be served consecutively. The defendant now appeals from the judgment of conviction entered below.

After a trial spanning six weeks, the record of which includes more than 5200 pages of transcript embodied in

twenty-six volumes, Claus von Bulow was found guilty of twice attempting to murder his wife by injecting her with doses of insulin. There were no eyewitnesses to these alleged crimes. Rather, the jury found defendant guilty on the basis of circumstantial evidence.

On December 21, 1981, Martha von Bulow was found in a comatose state on her bathroom floor in the family's Newport home—Clarendon Court. She remains in that condition at a New York hospital. Approximately one year earlier, she suffered a similar episode of unconsciousness from which she quickly recovered. The occurrence of the second coma triggered the events leading up to defendant's indictment, trial, and conviction. Suspecting that defendant may have poisoned his wife, Martha von Bulow's son, Alex; her daughter Ala; and her mother, Mrs. Aitken, hired former Manhattan District Attorney Richard Kuh to investigate the cause of Mrs. von Bulow's condition.

Chronologically, the events that gave rise to the family's suspicion and culminated in its investigation of defendant's possible criminal involvement are essentially as follows.

On December 27, 1979, Martha von Bulow suffered her first coma. On the previous evening, she became weak and uncoordinated and had to be helped to her bedroom by her son Alex. Maria Schrallhammer, Martha von Bulow's personal maid, testified that shortly after nine thirty on the morning of December 27, 1979, she heard Mrs. von Bulow moaning in her bedroom. Upon entering the room, she unsuccessfully attempted to arouse Mrs. von Bulow. Alarmed, she asked defendant to call a doctor, which he refused to do at that time. The defendant did call a doc-

tor, however, at approximately two o'clock that afternoon. The doctor was not in, and defendant left a message. The doctor returned the call about an hour later and defendant relayed to him several of his wife's symptoms.

In this regard, Maria testified that the description of Mrs. von Bulow's condition given by defendant to the doctor was untrue. Specifically, Maria testified that defendant's statements that Mrs. von Bulow had an alcoholic problem and that she had been drinking the night before and had been out of bed that morning were untrue.

At approximately six o'clock that evening, Martha von Bulow's condition worsened. The defendant called the doctor and conveyed to him the severity of her condition. Upon the doctor's arrival, Mrs. von Bulow vomited, began gasping for breath, stopped breathing, and experienced cardiac arrest. The doctor successfully resuscitated her and later testified that she had become comatose a few minutes prior to his arrival. Mrs. von Bulow was transported to Newport Hospital. Blood tests indicated that her blood-sugar level was unusually low. Mrs. von Bulow regained consciousness, recovered, and was discharged on January 2, 1980, with a diagnosis of "broncho-pneumonia * * * cardio-respiratory arrest due to massive aspiration of gastric contents * * * hypoglycemia of undetermined etiology."

Maria Schrallhammer further testified that in February 1980 she found something in the von Bulows' New York apartment which disturbed her. While cleaning a walk-in closet off defendant's bedroom, she noticed a large black traveling bag belonging to defendant. Upon looking inside this bag, she discovered a smaller black bag or pouch (hereinafter referred to as the black bag). Maria re-

moved the black bag, opened it, and examined its contents. Inside the black bag she found three vials—one containing pills, one containing powder, and one containing liquid. She then replaced the black bag and its contents inside the larger traveling bag. Some days or weeks later, Maria returned to the traveling bag, removed the black bag, and again examined its contents. On this occasion she wrote down the information contained on the labels of each vial on three separate pieces of paper.

In November 1980, around Thanksgiving, Maria once again noticed the black bag—this time she found it inside a white canvas bag located on a chair in defendant's bedroom. She again examined the contents of the bag. In addition to the three vials that she had seen previously, she stated that it now contained two or three needles, a syringe, and a small bottle labeled "insulin." Shortly thereafter, she called Alex into the room and showed him the contents of the black bag.

On December 19, 1980, Mr. and Mrs. von Bulow, along with defendant's daughter, Cosima, left New York and traveled to their Newport home where they were met by Alex. Maria testified that on that date she again saw the black bag inside the white canvas bag. She again examined the contents of the bag and found it to be substantially the same as it was in November. Once again she replaced the bag where she had found it and carried the white canvas bag to the elevator to be brought down to the family car for the trip to Rhode Island.

On the evening of December 20, 1980, defendant, Mrs. von Bulow, Alex, and Cosima were driven by the family chauffeur to a local cinema. The family was driven back

to Clarendon Court after the movie. Upon their return, Alex accompanied his mother to her bedroom, where they spoke briefly. Martha von Bulow subsequently went into the bathroom, and Alex adjourned to the library. A short time later Mrs. von Bulow joined her son in the library where they continued their conversation.

At some point during the conversation, defendant entered the library and asked his wife if there was anything that she needed. She asked him to bring her some soup, which he did.

Alex testified that after about an hour of conversation he noticed that his mother was experiencing symptoms of weakness and lack of coordination similar to those he had observed the previous December. When she experienced difficulty standing, Alex carried her to her bedroom. Alex then went to his stepfather's study and informed defendant that Mrs. von Bulow was feeling weak. Immediately thereafter, Alex returned to his mother's bedroom. Approximately five minutes later, Mrs. von Bulow emerged from her bathroom and walked to her bed. Alex helped his mother into bed as she was apparently still feeling very weak. A few minutes later, according to Alex's testimony, defendant came into the bedroom. Shortly thereafter, Alex left his mother and defendant alone in the bedroom.

Alex testified further that on the following morning, December 21, 1980, he awoke at approximately eleven o'clock. While dressing and before going downstairs to breakfast, he looked out his window and observed defendant walking back to the house from the ocean. Alex then went downstairs to the dining room. At some point de-

fendant came into the hallway, and Alex asked him whether his mother had gotten out of bed yet. The defendant appeared surprised to hear that his wife might still be in bed and walked toward her room. Alex testified that some ten or fifteen minutes later, defendant returned to the hallway near the dining room and motioned for him to come. Alex followed defendant to his mother's bedroom. Upon entering the room, he walked into the bathroom and discovered his mother lying unconscious on the floor. Alex testified that defendant placed his finger under his wife's nose and determined that she was still breathing. The defendant then left the room, apparently to call a doctor or the rescue squad. A few minutes later, paramedics responded, and Martha von Bulow was taken to Newport Hospital.

On December 22, 1980, Martha von Bulow was moved to Peter Bent Brigham Hospital in Boston. She was later transferred to Columbia Presbyterian Hospital in New York. During the period of time in which she was at the Boston Hospital (approximately three weeks), defendant and Alex alternately traveled to Boston for several days at a time to stay with Mrs. von Bulow. Alex testified that shortly after his mother had been transferred to Boston, he went into defendant's closet at Clarendon Court to look for the black bag. He did not find the bag on that occasion. Several days later, on December 27 or 28, 1980, he again attempted to enter defendant's closest for the purpose of locating the black bag. On this occasion, however, the closet was locked and he made no further effort to gain entry.

Alex later discussed his suspicions regarding defendant with Maria; his sister, Ala; and his grandmother,

Mrs. Aitken. Alex, Ala, and Mrs. Aitken subsequently discussed the possibility of hiring an attorney to look into the causes behind Martha von Bulow's condition. The family's financial advisor, Morris Gurley, was asked to recommend such an attorney. Gurley suggested the name of former Manhattan District Attorney Richard Kuh.

Sometime in early January 1981, Alex and Ala met with Kuh for the first time. The meeting lasted approximately one to one and a half hours. Alex testified that he and Ala discussed with Kuh their suspicions regarding defendant's conduct during those periods surrounding their mother's two comas. Alex testified further that between the time of this first meeting and January 23, 1981, there were at least six more meetings with Kuh.

Several days prior to January 23, 1981, Alex told Kuh about his previous attempts to locate the black bag in defendant's closet at Clarendon Court. It was apparently then decided that Alex would go back to Newport to look, once again, for the black bag.

On the afternoon of January 23, 1981, Alex drove from New York City to Rhode Island with a Mr. Edwin Lambert, a private investigator hired through Kuh. Alex and Lambert first went to Providence to engage a locksmith and then traveled on to Newport.

Once at Clarendon Court, Alex, Lambert, and the locksmith went to defendant's study. Alex obtained a set of keys from defendant's desk. The locksmith examined the keys and identified which key would fit the lock to defendant's closet. The door was opened, and the locksmith was dismissed.

Prior to searching the closet, Alex and Lambert searched the bathroom in defendant's study and the study

itself. Nothing unusual was found in the bathroom. In the study — in defendant's desk — Alex found a vial with French wording upon which he believed the word "Valium" was printed.

Once the search of the study was completed, Alex and Lambert entered defendant's closet. Alex initially went through some of defendant's clothes — patting the pockets — and discovered another vial similar to the one he had discovered in the desk. Alex testified that one of these two vials contained a powdered substance; however, he could not later be sure which one it was.

At some point during the search of defendant's closet, Lambert discovered a metal box. This metal box contained a small black bag that Alex recognized as being similar to the one he had seen before. Alex testified that the bag contained a prescription vial with different types of pills in it and another vial in which there was a light blue liquid. The black bag also contained two packets of ampules in plastic packaging, a syringe, and three hypodermic needles, one of which was unsealed. Inside the metal box, next to the black bag, Alex and Lambert also found a small cardboard box labeled "lidocaine" and containing an ampule and a syringe.

Upon completing the search of defendant's study and closet, Alex looked through his mother's room. He took pills from various containers found in the room and a vial of Inderal from the night table. When the entire search was completed, Alex placed all the items found (with the possible exception of the lidocaine) into the black bag and transported it all back to New York. Alex testified that the lidocaine may not have fit into the

black bag but was included with the items that he transported to New York.

Upon his return to New York, Alex initially went to his sister's apartment. He was then accompanied by Kuh to the office of Kuh's brother, a doctor, where the contents of the black bag were removed and examined. After the items had been examined, Alex returned them to his sister's apartment and placed them in a safe in her closet.

At some point during the next few days Alex removed the bag from the safe and prepared samples of some of the items to give them to the family physician, Dr. Richard Stock. Alex testified that the unsealed hypodermic needle, a sample of the blue liquid, and a sample of speckled white powder from one of the French vials of Valium were sent to Dr. Stock for testing. Doctor Stock sent these items to the Bio-Science Laboratory in Great Neck, Long Island.

Doctor Ronald L. Gambardella, director of the Bio-Science Laboratory in Great Neck, testified that he rinsed the needle with a saline solution and split the resultant washing into two separate specimens. He sent one of these specimens to Dr. J. George Nitis, director of the Bio-Science Laboratory branch in Columbia, Maryland, for a test to determine the presence of insulin. The other specimen was sent to Dr. V. J. Aggarwall, assistant director of the Boston Medical Laboratory, another branch of Bio-Science, for chemical testing to determine the presence and identity of other drugs. Doctor Gambardella also sent the white powder and the liquid to Dr. Aggarwall.

Doctor Nitis testified that the tests performed at his laboratory revealed the presence of insulin in the needle washing. Doctor Aggarwall testified that the washing he received contained amobarbital and diazepam (Valium). Doctor Aggarwall further testified that the powder that he received contained amobarbital and the liquid that he received contained amobarbital and diazepam.

On March 13, 1981, Alex transported the black bag and its contents to Rhode Island and handed them over to Lieutenant John Reise of the Rhode Island State Police. All of the items found in the January 23, 1981 search were turned over, with the exception of the samples and hypodermic needle given to Dr. Stock and the pills found in Martha von Bulow's bedroom.

Lieutenant Reise testified that on March 13, 1981, Alex came to Rhode Island State Police headquarters for the purpose of handing over the black bag and its contents. Attorney Kuh and a Detective Joseph Miranda were also present. Alex removed the items from the black bag, and Lieutenant Reise initialed and dated them. Lieutenant Reise prepared a seizure report and placed the items in the evidence room. On March 20, 1981, Lieutenant Reise removed certain of these items from the evidence room and sent them to the state toxicologist for testing. These items included five pills; one clear-glass ampule bearing the name "papaveretum"; one valium, two milligram, vial containing a white powder; one pill container with a white cap and amber base, believed to contain Valium and possible unknown barbiturates; and one clear-glass ampule with a yellow cap and a blue interior stopper, bearing the name "lidocaine." On April 23, 1981, Detective Miranda, under the direction of Lieutenant Reise, sent an additional pill to the state

toxicology laboratory for testing. This substance was later identified by Detective Miranda as one blue pill of Valium Roche-10.

The state continued the investigation, expanding upon the work of Kuh and the others involved in the family's investigation. Their efforts resulted in the indictment, trial, and ultimate conviction of defendant.

The defendant raises several issues on appeal to this court. We find two of them to be dispositive. These are: (1) whether the trial justice erred in denying defendant access to certain materials in Kuh's possession and (2) whether the trial justice erred by failing to exclude the results of tests performed by state officials upon the contents of the black bag without first obtaining a search warrant.

I

At the outset, we recognize that initially the facts underlying the rationale of issues relating to attorney-client privilege and work-product privilege were raised in a preliminary hearing in respect to a motion filed by defendant to dismiss the indictment on the ground of private prosecution. The rulings pertinent to these issues were first made at that hearing. We are of the opinion that defendant's claim of private prosecution was utterly without merit. We do not believe that this claim requires either discussion or extended analysis. Consequently, we also recognize that rulings of admission or exclusion of evidence insofar as they relate solely to the claim of private prosecution would be non-prejudicial in their effect. However, these rulings in relation to attorney-client privilege and work-product privilege were repeated

and applied without further analysis at various points during the trial on the merits of the case. It is in this context that we address these issues. It will be necessary to discuss facts developed at the preliminary hearing in order to consider the applicability of these privileges to this case.

On September 8, 1981, defendant filed an omnibus motion in the Superior Court requesting various forms of relief, including a request that the indictment be dismissed on the grounds that Kuh's involvement unconstitutionally interfered with the impartiality of the public prosecutor and unconstitutionally influenced the prosecution. In support of this motion and in a general effort to discover the extent of Kuh's involvement in the investigation, defendant called Kuh as a pretrial witness, serving upon him a subpoena duces tecum, which required Kuh to produce certain documents (hereinafter the Kuh documents). In particular, the subpoena directed Kuh to produce (1) telephone records, (2) time records, (3) records relating to work done by investigative agencies, and (4) records relating to interviews of witnesses. Through oral motions and requests and by the questioning of Kuh and Alex, defendant also sought disclosure of other materials, including notes of witness interviews and a summary of incriminating events turned over to the State Police.

The trial justice denied the oral motions and requests of defendant[1] and sustained objections to questions

---

[1] Defense counsel renewed his request, at trial, for Kuh's notes of witness interviews. This request was denied by the trial justice.

through which defendant was attempting to elicit information relative to the scope of Kuh's investigation. With regard to the materials requested in the subpoena duces tecum, the trial justice ruled that all the documents withheld by Kuh were protected by the attorney-client privilege[2] or the work-product doctrine. The trial justice then went on to deny defendant's motion to dismiss on the grounds of private prosecution.

The defendant claims that the trial justice erred in denying him access to the Kuh documents. Proper resolution of this issue requires both a careful analysis of these privileges and the application of the principles enunciated therein to the materials sought by defendant below and excluded by the trial justice.

The factual setting in which this claim of error comes before us is somewhat unique in that the materials sought by defendant both before and during trial were generated, not by the prosecution, but by an independent third party.[3] This is significant in that Kuh, a private party, is not subject to the same restrictions or bound by the same obligations as a public prosecutor.

A. *Attorney-Client Privilege*

We address ourselves initially to defendant's claim that the Kuh documents were not shielded from disclo-

---

[2] Alex testified at the pretrial hearing, on advice of counsel, that he would not waive his attorney-client privilege in regard to the content of his discussions with Kuh and that he would not consent to the disclosure of materials in Kuh's possession.

[3] Although Kuh remained involved in the case subsequent to the time the State of Rhode Island began its investigation, we are satisfied that Kuh retained his status as a private party and was not at any time an agent of the state.

sure by the attorney-client privilege. We have said that "[t]he attorney-client privilege protects from disclosure only the confidential communications between a client and his or her attorney." *DeFusco v. Giorgio*, — R.I. —, —, 440 A.2d 727, 731 (1982). "The general rule is that communications made by a client to his attorney for the purpose of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure." *Haymes v. Smith*, 73 F.R.D. 572, 576 (W.D. N.Y. 1976) (citing *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed.2d 499 (1963)).

Professor Wigmore has set forth a statement of the general principle of the privilege as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, *Evidence*, § 2292 at 554 (McNaughton rev. 1961).

The United States Court of Appeals for the Fifth Circuit has also commented upon the elements that must be established in order to invoke the attorney-client privilege. In *United States v. Kelly*, 569 F.2d 928, 938 (5th Cir.), *cert. denied*, 439 U.S. 829, 99 S. Ct. 105, 58 L. Ed.2d 123 (1978), the court set forth the requisite elements as

> "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member

> of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *See also Status Time Corp. v. Sharp Electronics Corp.*, 95 F.R.D. 27, 29 (S.D. N.Y. 1982).

It is well settled that the burden of establishing these elements is on the party advancing the privilege. *In Re Horowitz,* 482 F.2d 72, 81-82 (2d Cir.), *cert. denied,* 414 U.S. 867, 94 S. Ct. 64, 38 L. Ed.2d 86 (1973); *see also United States v. Kelly,* 569 F.2d at 938. In the present case, therefore, the burden was on the witness — Alex — to establish the existence of the privilege between himself and Kuh.[4] The trial justice in finding that the privilege was applicable, apparently was satisfied that Alex had sustained that burden. We disagree.

Applying the elements of the attorney-client privilege to the facts contained in the record before us, we are satisfied that an attorney-client relationship did exist between Kuh and Alex. Alex, along with his sister and grandmother, retained Kuh to look into the causes that

---

[4] Although Alex, Ala, and Mrs. Aitken initially contracted Kuh, only Alex was questioned at the pretrial hearing regarding the existence of the attorney-client privilege. The state submitted a motion at trial to keep any reference of the attorney-client privilege claimed by any of the clients away from the jury. The trial justice granted the motion and prohibited defense counsel from asking Alex questions that would have revealed that he had invoked and was continuing to invoke the attorney-client privilege.

brought about Mrs. von Bulow's condition. Although defendant argues that Kuh was retained for investigative purposes only and was therefore not consulted for the purpose of obtaining professional legal advice, we feel that the family's reasons for retaining Kuh went beyond that narrow purpose. Implicit in their instructions for Kuh to investigate the circumstances surrounding Martha von Bulow's comatose condition was their desire to obtain a legal opinion from Kuh about whether defendant had engaged in any criminal conduct. Given these facts, we are satisfied that an attorney-client relationship existed at the outset between Kuh and Alex.

Our inquiry, however, does not end here. The attorney-client privilege is limited to communications between the attorney and the client which are expressly intended to be confidential. *Hearn v. Rhay,* 68 F.R.D. 574 579 (E.D. Wash. 1975). "[T]he mere relation of attorney and client does not raise a presumption of confidentiality." *Id.* (citing 8 Wigmore, § 2311 at 182-83). In the present case, however, the record discloses that the communications between Kuh and his clients were initially intended to be kept confidential.

The attorney-client privilege is only available when all of the elements, as set forth above, are present. *See International Telephone and Telegraph Corp. v. United Telephone Co. of Florida,* 60 F.R.D. 177, 184 (M.D. Fla. 1973). An essential element that must be proved in establishing the existence of the privilege is that it has not been waived. Absent such a waiver, the communications to which Kuh and Alex referred would be protected from disclosure since the privilege normally protects a client from having to disclose even the subject matter of confi-

dential communications with his attorney. *United States v. Aronoff,* 466 F.Supp. 855, 861 (S.D. N.Y. 1979). The privilege may be waived, however, when there has been disclosure of a confidential communication to a third party. *Id.* at 862; *see also Status Time Corp. v. Sharp Electronics Corp.,* 95 F.R.D. at 34; *Haymes v. Smith,* 73 F.R.D. at 576; *Edmund J. Flynn Co. v. LaVay,* 431 A.2d 543, 551 (D.C. 1981); *State v. Driscoll,* 116 R.I. 749, 757, 360 A.2d 857, 861 (1976).

In considering whether there was a waiver of the privilege in this case, we are mindful that the attorney-client privilege operates as a narrow exception to the general rule that every person must offer testimony on all facts relevant to a judicial proceeding. *Edmund J. Flynn Co. v. LaVay,* 431 A.2d at 551 (citing 8 Wigmore, § 2285). Because the attorney-client privilege limits the full disclosure of the truth, it must be narrowly construed. We shall recognize the privilege, therefore, only if it has not been waived. *Haymes v. Smith,* 73 F.R.D. at 576.

Courts have found waiver of the attorney-client privilege in a variety of situations, including those in which the client has consented to the disclosure and those in which he has not. *See, e.g., In Re Grand Jury Investigation of Ocean Transportation,* 604 F.2d 672, 675 (D.C. Cir.), *cert. denied,* 444 U.S. 915, 100 S. Ct. 229, 62 L. Ed.2d 169 (1979). In *Ocean Transportation* the District of Columbia Court of Appeals upheld the denial of a motion for the return of allegedly privileged documents inadvertently disclosed to the Antitrust Division of the United States Department of Justice. The court held that original counsel acted as "agent [for the client] in de-

termining which documents would be produced pursuant to the subpoena and which documents would be withheld under the attorney-client privilege." *Id.* It was clear to the court that "the mantle of confidentiality which once protected the documents [had] been so irretrievely breached [by the disclosure] that an effective waiver of the privilege [had] been accomplished." *Id.*

In the present case, Alex and the other family members instructed Kuh to contact the authorities. Kuh contacted the Attorney General's office by telephone and first met with the Rhode Island State Police on February 25, 1981. At that first meeting, Kuh turned over a typewritten summary prepared by him detailing incidents that had led him and the family to conclude that defendant had attempted to kill his wife. He also turned over photocopies of medical records and information concerning defendant's trip to the Bahamas "with someone other than his wife" and generally informed the State Police of information he had obtained from his clients and from Dr. Stock. Kuh also testified that the summary contained a narration of what he had learned from his interviews of potential witnesses. On March 13, 1981, Kuh accompanied Alex to State Police headquarters, at which time all of the items found in the January 23, 1981 search were turned over, with the few exceptions noted above.

These facts clearly indicate that the disclosure of information to the State Police by Kuh was made with the consent of his clients. It is also not unlikely that Alex himself made disclosures concerning the nature of the investigation undertaken by him with the assistance of Kuh and others during the course of his many contacts

with the Rhode Island authorities. Notwithstanding the assertions of Kuh and Alex that the nature of Kuh's work was always intended to be kept confidential, the above facts constitute an irrevocable breach of that confidentiality. This breach of confidentiality in our opinion rises to the level of waiver, thereby destroying an essential element of the privilege. In *Ocean Transportation* the court noted that "[a]n intent to waive one's privilege is not necessary for such a waiver to occur." 604 F.2d at 675. This proposition is equally applicable to the case before us. Although confidentiality was initially desired, the family subsequently chose to disclose their suspicions and the information they had obtained to the authorities. That choice is binding, in spite of their initial intentions.

The state argues that in reporting to the authorities, Kuh never disclosed any of the actual confidential communications or documents reflecting these communications. It is the state's position that Kuh simply revealed specific results and facts that were the subject of the communication. These disclosures, the state contends, are distinguishable from the disclosures of actual privileged documents. While we agree that the documents disclosed may not have contained verbatim confidenal communications between attorney and client, we are nevertheless satisfied that the disclosure of these documents and the oral disclosures made by Kuh constituted a waiver of the privilege.

It is not necessary that actual privileged communications or documents reflecting such communications be disclosed to effect a waiver of the privilege. "[A] disclosure of, or even merely an assertion about, the com-

munication may effect a waiver of privilege not only as to that communication, but also as to other communications made during the same consultation and communications made at other times about the same subject." *United States v. Aronoff,* 466 F.Supp. at 862; *see also Status Time Corp. v. Sharp Electronics Corp.,* 95 F.R.D. at 34. In the present case Kuh disclosed, at the very least, the subject matter of communications between himself and his clients. At the very most, Kuh may have disclosed actual communications made by his clients. Kuh testified at the pretrial hearing that he generally informed the State Police of information he had obtained from his clients. In light of this statement, it is difficult to imagine that confidential communications were not disclosed during the course of the ongoing meetings held between Kuh and Alex and between Kuh and the Rhode Island authorities.

Assuming arguendo that actual confidential communications were not disclosed, the extent to which disclosures relating to the subject matter of the attorney-client relationship were made was sufficient to waive the privilege. As the court stated in *United States v. Aronoff,* 466 F. Supp. at 862 this principle has been referred to as "waiver by implication" and it is based on considerations of fairness.

> "[W]hen [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final. 8 Wigmore, supra § 2327, at 636. *See also McCormick on Evidence* § 93, at 194 (2d ed. 1972)." *Id.*

Consistent with these principles of fairness, it has been held that the attorney-client privilege properly serves as a shield and not as an offensive tool of litigation. *Edmund J. Flynn Co. v. LaVay,* 431 A.2d at 551; *see also International Telephone & Telegraph Corp. v. United Telephone Co. of Florida,* 60 F.R.D. at 185. The court in *Aronoff* recognized that "[w]here a privilege-holder has made assertions about privileged communications, but has attempted to bar other evidence of those communications, there is a serious danger that his assertions are false or misleading." *United States v. Aronoff,* 466 F.Supp. at 862. "A party may not, therefore, insist upon protection of the privilege for damaging communications while disclosing those which it considers to be favorable to its position." *Edmund J. Flynn Co. v. LaVay,* 431 A.2d at 551; *see also International Telephone & Telegraph Corp. v. United Telephone Co. of Florida,* 60 F.R.D. at 185.

The facts of the present case are a classic example of the impermissible selective use of privileged information. While maintaining that communications were intended to be confidential, Alex and his attorney, at Alex's direction, disclosed information sufficient to trigger an investigation by the state and an indictment. These same parties later refused to disclose other evidence of the same communications. The inequity of allowing the privilege holder in this case to disclose as much as he pleased while withholding the remainder is heightened by the fact that defendant was on trial for attempted murder. The effect of excluding such evidence was therefore to deny defendant access to information that he was entitled to examine in the preparation of his defense.

The defendant also argues that the attorney-client privilege was waived by the presence of third parties at various consultations between Kuh and his clients. To the extent that this claim is borne out by the record, "the presence of third persons who are not essential to the transmittal of information will belie the necessary element of confidentiality and vitiate the privilege." *Hearn v. Rhay*, 68 F.R.D. at 579. Kuh testified pretrial that a meeting took place on January 22, 1981, at which the possibility of Alex's returning to Newport to search for the black bag was discussed. Kuh also testified that Mr. Gurley (the family's financial advisor) may have been present for all or part of that meeting. If such was the case, Mr. Gurley's presence at that meeting would have destroyed the necessary element of confidentiality, thereby effectuating a waiver of the privilege in respect to those communications.

The defendant argues further that the privilege was waived by the courtroom testimony of Alex and Kuh. It has been held that although

> "the client does not waive the privilege by testifying generally in the cause or testifying as to facts which were the subject of consultation with his attorney, if the client or his attorney at his instance takes the stand and testifies to privileged communications in part this is a waiver as to the remainder of the privileged consultation or consultations about the same subject." *International Telephone and Telegraph Corp. v. United Telephone Co. of Florida*, 60 F.R.D. at 185-86. *See also DeFusco v. Giorgio*, — R.I. at —, 440 A.2d at 731.

In the present case, both Alex and Kuh testified at the pretrial hearing about the nature and purpose of Kuh's retention by the family. This is the very fact that was

initially intended to be maintained in confidence and subsequently disclosed. This testimony may have been sufficient, in and of itself, to waive the privilege with respect to the remainder of the consultations about this same subject.

A finding of waiver, however, does not depend upon the presence of third parties at consultations between Kuh and his clients or the courtroom testimony of Kuh and Alex. These events do, however, highlight the great extent to which disclosures were made in this case. It is our opinion that far too much was disclosed. As Professor Wigmore has stated, the privilege holder "may elect to withhold or to disclose, but after a certain point his election must remain final." 8 Wigmore, § 2377 at 636. That point was reached in the present case. The trial justice was clearly wrong, therefore, in finding that the Kuh documents were protected by the attorney-client privilege.

The state concedes that the attorney-client privilege does not apply to communications between Kuh and Maria Schrallhammer, Morris Gurley, Dr. Richard Stock, and Charles Roberts. They also concede that Kuh's time and telephone records, the medical records from Newport Hospital, the summary of incriminating evidence prepared by Kuh, and the reports of private investigative agencies "do not fall under the protective umbrella of the attorney-client privilege." We agree. However, to the extent that any of these documents reflect confidential communications between attorney and client, they would have come within the ambit of the attorney-client privilege had that privilege not been waived. *See Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962); *see also In Re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

B. *Work-Product Privilege*

It is the state's position that any documents not protected by attorney-client privilege are protected by the work-product doctrine. We disagree.

The work-product doctrine was first defined in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, L.Ed. 451 (1947). The privilege protects certain materials "obtained or prepared by an adversary's counsel with an eye toward litigation • • •." *Id.* at 511, 67 S.Ct. at 394, 91 L.Ed. at 462. *Hickman* was recently addressed by the District of Columbia Circuit Court of Appeals in the context of a grand jury investigation in *In Re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982). In that case the court observed that

> "[i]n *Hickman* the Supreme Court read into the Federal Rules of Civil Procedure then in effect a two-tiered protection from discovery for attorney work product • • •. To the extent that work product contains relevant, nonprivileged facts, the *Hickman* doctrine merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery. However, to the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification." *Id.* at 809-10.

The work-product doctrine does not, however, provide an absolute privilege. As the court stated in *In Re Sealed Case,* the *Hickman* Court "scrupulously avoided recognizing a general privilege for work product." *Id.* at 810. *See also United States v. Nobles,* 422 U.S. 225, 237-38, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141, 153 (1975);

Fireman's Fund Insurance Co. v. McAlpine, 120 R.I. 744, 754, 391 A.2d 84, 90 (1978).

In *United States v. Nobles,* 422 U.S. at 238, 95 S.Ct. at 2170, 45 L.Ed.2d at 153, the Supreme Court recognized a privilege for work product in criminal discovery. *In Re Sealed Case,* 676 F.2d at 810; *In Re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. 368, 374 (E.D. Wis. 1979). The Court found that the privilege was waived, however, when the holder of the privilege elected to adduce testimony from an investigator about the contents of an allegedly privileged report. *United States v. Nobles,* 422 U.S. at 239-40, 95 S.Ct. at 2170-71, 45 L.Ed.2d at 154.

As noted above, the state relies upon both the attorney-client and the work-product privileges to support the ruling of the trial justice. Of the two, the work-product privilege is broader. *United States v. Nobles,* 422 U.S. at 238 n. 11, 95 S.Ct. at 2170 n. 11, 45 L.Ed.2d at 153 n. 11; *In Re Sealed Case,* 676 F.2d at 808. The attorney-client privilege covers only confidential communications between attorney and client. The work-product privilege, on the other hand,

> "protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share. And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party." *In Re Sealed Case,* 676 F.2d at 809.

Although the purposes of the work-product privilege are more complex than those of the attorney-client privilege and may not be inconsistent with selective disclosure, at some point the privilege must yield to the needs of the

adversary system. *See In Re Sealed Case,* 676 F.2d at 818. This consideration is of paramount importance in the criminal context. In the criminal justice system, the work-product doctrine serves to protect "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence * * *." *United States v. Nobles,* 422 U.S. at 238, 95 S.Ct. at 2170, 45 L.Ed.2d at 153. As with the attorney-client privilege, when a party seeks to use the work-product privilege in a manner inconsistent with this purpose, courts are justified in finding a waiver where selective disclosure would prevent the system from fairly and accurately resolving the question of guilt or innocence. *See In Re Sealed Case,* 676 F.2d at 818.

Applying these principles to the present case, we must initially determine whether the work-product doctrine is applicable in the first instance. In light of *Nobles,* there is no question that the privilege is applicable in the criminal context. Our initial inquiry becomes, therefore, whether or not the allegedly privileged material was obtained or prepared in anticipation of litigation. The state correctly asserts that the work-product privilege has been held to protect materials prepared in anticipation of litigation other than the specific litigation in which its disclosure is sought. *See In re Murphy,* 560 F.2d 326, 334 (8th Cir. 1977); *United States v. Capitol Service, Inc.,* 89 F.R.D. 578, 585-86 (E.D. Wis. 1981).

In the present case, the state contends that the prospect of litigation was evident during the time in which the alleged work product was being created. Such prospective litigation, it is argued, included possible litigation

over Mrs. von Bulow's estate, a conservatorship proceeding for Mrs. von Bulow, a civil action for wrongful death, and representation of Kuh's clients before the grand jury and at a subsequent criminal trial. In light of the foregoing authority, we cannot say with certainty that the material in question was not prepared in anticipation of litigation. Even assuming that the civil litigation was not anticipated, it is our opinion that the possibility of a criminal trial was evident from the beginning. Also, the fact that Kuh did not represent a party to the proceedings should not, in and of itself, render his work product subject to disclosure. *See Grumman Aerospace Corp. v. Titanium Metals Corp. of America,* 91 F.R.D. 84, 88-89 (E.D. N.Y. 1981); *Vilastor-Kent Theatre Corp. v. Brandt,* 19 F.R.D. 522 (S.D.N.Y. 1956).

Assuming without deciding, therefore, that the Kuh documents were obtained or prepared in anticipation of litigation, we must now determine to what extent these documents are "the sort of 'memoranda, * * * mental impressions,' and 'thought, heretofore inviolate' for which the *Hickman* doctrine was fashioned." *In Re Sealed Case,* 676 F.2d at 811.

The subpoena issued to Kuh called for the production of (1) telephone records, (2) time records, (3) records relating to work done by investigative agencies, and (4) records relating to interviews of witnesses. Defense counsel also requested, inter alia, the production of the summary report turned over to the State Police.

We shall focus initially upon Kuh's notes of witness interviews. These notes clearly fall within the definition of opinion work product. The Supreme Court has said,

in the context of the disclosure of witness statements under the Jencks Act, that to the extent an attorney has recorded his own thoughts in his interview notes, the notes would seem to come within the work-product immunity. *Goldberg v. United States,* 425 U.S. 94, 106, 96 S.Ct. 1338, 1346, 47 L.Ed.2d 603, 615 (1976). In *In Re Grand Jury Subpoena Dated July 13, 1979,* 478 F. Supp. at 374, the court found that interview memoranda prepared by counsel in an internal investigation conducted in anticipation of potential civil and criminal litigation were protected by the work-product doctrine as defined in *Hickman.* The court concluded both that government attorneys did not make a sufficient showing to justify discovery of these memoranda and that *Hickman* supports the conclusion that "interview memoranda may be discovered only in a 'rare situation.'" *Id.* at 375. It is therefore incumbent upon us to determine whether the case before us presents such a "rare situation" in which interview memoranda should be disclosed. We feel that it does.

Although there is no per se waiver rule in the work-product area, *see Grumman Aerospace Corp. v. Titanium Metals Corp. of America,* 91 F.R.D. at 89, we feel justified in finding an implied waiver of the privilege in this case. Professor Wigmore has commented, in the context of the attorney-client privilege, that "the privilege of secret consultation is intended only as in incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." 8 Wigmore, § 2327 at 638. We find that the selective disclosure of alleged work product in the present case was precisely the sort of independent attack that constituted an abandonment of the privilege.

On the basis of the record before us, we have no way of knowing to what extent information obtained by Kuh from interviews with prospective witnesses was disclosed to the Rhode Island authorities. We do know, however, that from the outset Kuh and his clients, by choice selectively disclosed information sufficient to help the state build its case against defendant while relying on one privilege or the other to prevent the flow of potentially relevant evidence to defendant. This selective use of allegedly privileged material cannot be said to have promoted the interests of society or defendant in reaching a fair or accurate resolution of the question of guilt or innocence.

An example of the unfair use of information allegedly protected by the work-product doctrine occurred near the end of the trial when Kuh took the stand as a rebuttal witness. The state called Kuh to impeach the testimony of Charles Roberts, the family chauffeur, which indicated that Mrs. von Bulow was receiving frequent prescriptions for various medications from several doctors. Kuh testified that information that he had obtained from Roberts at a prior meeting was inconsistent with his testimony in court. There is also evidence that Kuh relied upon the very interview notes that he had previously refused to disclose to buttress this alleged inconsistency.[5]

Selective use of the privilege can also be seen in the use of the summary of incriminating events which was turned over to the State Police by Kuh and subsequently

---

[5] Defense counsel requested a side-bar conference when Kuh was called. During that conference defense counsel asked the prosecutor if Kuh had obtained a written statement from Roberts. The prosecutor responded, "I don't think there's a written statement, no, but I think he has notes on it."

denied to defendant. Although the document is not before us, Kuh testified that it contained a narration of what he had learned from his investigation, including information obtained from his interviews of potential witnesses. To the extent that the summary contained Kuh's own thoughts or mental processes in synthesizing the information, it would be entitled to work-product protection, *see Goldberg v. United States,* 425 U.S. at 106, 96 S.Ct. at 1346, 47 L.Ed. 2d at 615, absent its waiver, However, when the disclosure of this evidence is viewed in conjunction with all of the other disclosures made by Kuh, including those discussed in the context of the attorney-client privilege, we find that pattern of controlled and aggressive use of allegedly privileged material which necessarily waives the privilege.

We note that reports of investigative agencies are also work product, *United States v. Nobles,* 422 U.S. at 238-39, 95 S.Ct. at 2170, 45 L.Ed.2d at 154, and would be entitled to protection in the absence of waiver. They are not, however, opinion work product since they do not reflect the judgments and thought processes of counsel. They may be discovered, if relevant, upon a showing of adequate reasons. *See In Re Sealed Case,* 676 F.2d at 809. Telephone and time records would fall into the same category. Although it is unclear to what extent defendant was prejudiced by the denial of access to these documents, they nevertheless came within the protective umbrella of the trial justice's ruling.

We addressed the work-product privilege in the civil context in *Fireman's Fund Insurance Co. v. McAlpine,* 120 R.I. 744, 391 A.2d 84 (1978). In that case we stated that the party seeking production has the burden of showing that a denial of production or inspection will result in an

injustice or undue hardship. The ultimate determination of that issue is vested in the sound discretion of the trial justice. *Id.* at 754, 391 A.2d at 90.

The injustice and hardship to defendant in the present case is clear. The effect of denying him access to the requested material was to block the flow of potentially relevant evidence that may have been vital to his defense. The work-product doctrine was initially set forth as a limitation on civil discovery. Although that doctrine also serves a purpose in the criminal context, we shall not subject the needs of a criminal defendant to the same hard and fast application of the civil rule. We find, therefore, that the trial justice abused his discretion in ruling that the requested documents were protected by the work-product privilege.

McAlpine also stands for the proposition that discoverable matter must be both relevant and not privileged. *Id.* at 747, 391 A.2d at 86. Ordinarily, therefore, we would remand this case to the trial court with instructions to examine the documents in question, in a manner consistent with this opinion, to determine (1) which of the documents are not privileged and (2) which unprivileged documents are relevant. Our use of such a remand in this case is precluded, however, by our disposition of defendant's search and seizure claims.

II

A. *Private vs. Public Searches*

The activities of Alex and Lambert in entering Clarendon Court on January 23, 1981, to locate the black bag included their search of defendant's closet, bathroom, desk, and study. Despite defendant's vigorous assertion that the

prior involvement of Attorney Kuh was so extensive as to make this search governmental, we are not persuaded that the strictures of the Fourth Amendment should apply to their entry and search that day. Alex and Lambert's conduct "did not implicate the Fouth Amendment * * * because the constitutional prohibition of unreasonable searches and seizures applies only to governmental conduct." *State v. Eiseman,* — R.I. —, —, 461 A.2d 369, 374 (1983) (citing *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048, 1051 (1921)). No matter how egregious their actions may appear in a society whose fundamental values have historically included individual freedom and privacy, the exclusionary rule cannot be invoked by defendant to bar the introduction of evidence that was procured by Alex and Lambert while acting as private citizens. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim * * *," *United States v. Calandra,* 414 U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561, 571 (1974); *State v. Soratt,* 120 R.I. 192, 193-94, 386 A.2d 1094, 1095 (1978), but rather to deter unconstitutional methods of law enforcement. *United States v. Janis,* 428 U.S. 433, 446-47, 96 S.Ct. 3021, 3028-29, 49 L.Ed. 2d 1046, 1056-57 (1976); *State v. Carillo,* — R.I. —, —, 407 A.2d 491, 496 (1979); *State v. Spratt,* 120 R.I. at 194, 386 A.2d at 1095.

Similar principles do not, however, govern our review of the evidence-gathering techniques employed by the state. Our decision in *State v. Eiseman,* — R.I. —, 461 A.2d 369 (1983), requires our application of an analysis that clearly separates the Fourth Amendment standards to be applied to the private search of Clarendon Court on January 23, 1981, from those governing the subsequent chemical testing

of certain fruits of that search by the Rhode Island State Police.[6] In *Eiseman* we held that when the government significantly expands a prior private search without first securing a search warrant and no recognized exception to the warrant requirement exists to justify such expansion, the independent governmental search is subject to the proscriptions of the Fourth Amendment, *State v. Eiseman*, — R.I. at —, 461 A.2d at 377.

B. *Warrant Requirement*

At the outset, two specific points should be made. First, there is no dispute about the fact that the state failed to obtain a warrant before chemically testing the pills received from Alex. Indeed, under cross-examination by defense counsel, Lieutenant Reise plainly admitted that this subsequent chemical testing was performed without the state's first having obtained a search warrant. Second, there is no evidence in the record to support a finding that any recognized exception to the warrant requirement existed to justify the chemical testing.[7] Despite this con-

---

[6] As previously noted, all of the fruits of Alex and Lambert's search, except those samples given to Dr. Stock and the pills found in Martha von Bulow's bedroom, were delivered to the Rhode Island State Police by Alex on March 13, 1981. This evidence was inventoried and stored in the State Police evidence room until March 20, 1981, the date on which Lieutenant Reise ordered that certain samples be removed from it and sent to the state toxicology lab for testing.

[7] This chemical testing did not involve consent by defendant, (*State v. Locke*, — R.I. —, —, 418 A.2d 843, 847 (1980)), nor can it be viewed as a search incident to defendant's lawful arrest (*Id.*), an automobile search of his car (*New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)), an administrative inspection of his home (*Camara v. Municipal Court of*

(Continued on next page)

spicious absence, however, the state urges on appeal that two specific exceptions to the warrant requirement should be applied here.[8] One of these two exceptions, the plain-view doctrine, we can summarily dismiss. We have previously rejected this doctrine as totally nonviable in an expansion case. "The plain-view doctrine validates the warrantless *seizure* of evidence." *State v. Eiseman,* — R.I. at —, 461 A.2d at 380 (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 464-66, 91 S.Ct. 2022, 2037-38, 29 L.Ed. 2d 564, 581-83 (1971)). It cannot be used "to justify conduct that *may* constitute a 'significant expansion' of the private search." *State v. Eiseman,* — R.I. at —, 461 A.2d at 381.

The other warrant exception claimed by the state, "harmless error," is equally without merit. "A determination of whether error is harmless must turn upon whether there is a reasonable possibility that the error complained of contributed to the conviction. Before a federal constitutional error can be held harmless, we must be able to declare a belief that it was harmless beyond a reasonable doubt." *State v. Robalewski,* — R.I. —, —, 418 A.2d 817, 824 (1980) (citing *Chapman v. California,* 386 U.S. 18, 23-24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967); *State v. Lachapelle,* 112 R.I. 105, 113, 308 A.2d 467, 471 (1973)).

(Continued from previous page)

San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)), or a border search (*United States v. Cortez,* 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States v. Ramsey,* 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977)).

[8] In its initial brief filed with this court, the state specifically claimed that the admission of the chemical testing of one red capsule was harmless beyond a reasonable doubt. In its reply brief, the state tacitly embraced the plain-view exception in its discussion of *Illinois v. Andreas,* — U.S. —, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983), as further justification for the chemical testing.

Even cursory review of the record precludes such a declaration. Unlike the situation in *State v. Robalewski,* — R.I. —, 418 A.2d 817 (1980), in this case there is no direct evidence to connect defendant with the two alleged murder attempts upon his wife. In *Robalewski,* the most recent case in which we applied a "harmless error" exception to the Fourth Amendment's warrant requirement, strong eyewitness testimony of an assaulted security guard constituted sufficient direct evidence to convict the defendant without the introduction of the tainted revolver at trial. In fact, in that case, Officer Superczynski's testimony "was the core of the state's case against defendant." *Id.* at 824. The precisely opposite situation prevails here. The state's entire case is predicated upon circumstantial evidence. These chemical tests of certain contents of the black bag formed a significant part of the state's case. Not only did the circumstantial evidence suggest that defendant had injected his wife with insulin by means of a hypodermic needle, but it also implied that defendant may have anesthetized her prior to such an injection. The importance of these chemical tests is demonstrated by the fact that the state explicitly relied upon the results of these tests to prove its theory of the case. A clear illustration of this reliance can be found in an excerpt from the prosecutor's own remarks made during closing argument:

> "* * * [O]ne of the capsules which was found inside the Dalmane bottle which is marked Secobarbital, actually contains not only Secobarbital, but Amobarbital and Cyclizine. I just don't know, for the life of me, what the significance of that is, but I just can't see if that drug belonged to Martha von Bulow, why she would take a capsule and mix in some other drugs with it. It is only consistent with the surreptitious or the

secreted administration of drugs on the part of another person.

"It would have been very easy, ladies and gentlemen, for Claus von Bulow to anesthetize his wife, to drug his wife at any point in time, and especially prior to—just prior to giving her the injection on each of these occasions, December 27th of 1979 and December 21st—excuse me, December 26th of 1979 and December 20th of 1980. On both of those evenings, there's testimony that she came home from the movies on the second occasion and went into the bathroom. He was in the study. She had a headache. Very simple. 'Can I get you a glass of water, Dear?' It would have been so easy for him to put some of that powder Amobarbital found in his pocket or in the desk * * * the powder Amobarbital and the little French Valium, spike it a little bit. Very easy for him to do that."

Consequently, the presence of the tranquilizing and anesthetic drugs in the black bag and their positive identification by the state toxicologist[9] firmly tightened the web

---

[9] The state toxicologist in charge of the Law Enforcement Laboratory, Mr. Robert A. Miller, testified that he chemically analyzed the substances delivered to him by the State Police. The results of that testing follow:

1. One red capsule marked Lilly F-40 found to contain secobarbital, amobarbital and cyclizine.

2. One blue capsule marked Lilly F-33 found to contain amobarbital.

3. One yellow capsule found to contain flurazepam, a benzodiazepine-type drug which is similar to a sedative and of the same class as Valium.

4. One light blue tablet found to contain diazepam, the generic name for Valium.

5. One light orange tablet containing Inderal. (This is a non-controlled substance. This tablet was not chemically analyzed. Rather, it was identified on the basis of a physical examination).

(Continued on next page)

of circumstantial evidence around which the state had woven its case against defendant. At a minimum, the admission by the trial justice of the results of the tests performed by the state toxicologist created a reasonable possibility that defendant would be convicted. *Id.* [10]

(Continued from previous page)

6. One clear-glass ampule bearing the name papaveratum, the liquid therein found to contain morphine and codeine.

7. One Valium, two milligram, vial containing white powder with red speckles. This powder was found to contain amobarbital.

8. One pill container with a white cap and amber base believed to contain Valium and possible unknown barbituates suspended in an unknown liquid. Tests showed the presence of diazepam (Valium).

9. One clear-glass container with a yellow cap and a blue interior stopper, found to contain Lidocaine Hydronloride, a non-controlled substance classified as a local anesthetic, and having other uses.

[10] Without question, the presence of the insulin upon the needle that had been determined as a result of the private test performed by the Bio-Science Laboratory in Columbia, Maryland, was of greater probative value than the identity of the other substances examined by the state toxicologist. Nevertheless, these pills, containing various controlled substances whose identities were only determined by the state's having expanded upon the initial private search, cannot be said to have been harmless beyond a reasonable doubt.

Nothing we have stated in this opinion should, however, be construed to indicate that the private tests conducted at the request of Dr. Stock at the Bio-Science Laboratories upon the needle that had been removed by Alex from the black bag were in any way tainted by the conduct of the Rhode Island State Police in respect to the other contents of the bag. It is clear that the state did not rely upon its own independent test of the needle. Thus, we do not suggest that the results of the tests performed at Bio-Science Laboratories were not properly admitted under the doctrine of private search enunciated in *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

C. *State Expansion of Private Search*

Because no warrant was procured to authorize the chemical testing and no exception to the warrant requirement exists to justify its absence, the admission of these test results by the trial justice can only be permitted if it is determined that the subsequent testing was not a significant expansion of the prior private search. Although we decided in *Eiseman* that a remand to the trial justice was the proper procedure to follow in making such a determination, adopting the same course of action in this case would be inappropriate. Our remand in *Eiseman* was necessary because the trial justice's ruling was "inadequately definitive for our review." *State v. Eiseman*, — R.I. at —, 461 A.2d at 377. Specifically, we were unable to ascertain in that case whether the trial justice made a specific finding that the subsequent state testing was an independent governmental search. *Id.* This case presents no such difficulty. We are confronted here with a situation in which the trial justice made the requisite findings concerning the "significant expansion doctrine" first enunciated in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).[11] Therefore, his findings and ruling upon defendant's motion to suppress are sufficiently specific to be final for purposes of our review.

The essential facts in *Eiseman* are virtually identical to those present in *United States v. Jacobsen*, 52 U.S.L.W.

---

[11] In ruling upon defendant's motion to suppress, the trial justice specifically found that (1) the activities of the State Police, including the toxicological testing, did "not involve a search within the meaning of the Fourth Amendment" and (2) even if this toxicological examination was a search, it was not unreasonable under the totality of the circumstances.

4414 (U.S. April 2, 1984) (No. 82-1167)[12] The Court's majority opinion, authored by Justice Stevens, specifically held that in cases in which (1) a field test "could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine," *Id.* at 4417, (2) there was "no other arguably 'private' fact," *Id.* at 4418, and (3) it was virtually certain that the powder could have been nothing but contraband, *Id.* at 4417 n. 17, the Fourth Amendment did not require the agent to obtain a warrant before conducting the field test. *Id.* at 4418.

Consequently, had Steven Eiseman come before this court subsequent to the Supreme Court's *Jacobsen* decision, our conclusion upon his Fourth Amendment claim would have been quite different. If one assumes the field test at issue in *State v. Eiseman,* — R.I. —, 461 A.2d 369 (1983) could only reveal one fact—the presence or absence of cocaine—his appeal would not have been remanded to the trial justice for specific findings concerning the degree of governmental expansion of the prior private search. If *Jacobsen* had been the law of the land on June 10, 1983, Steven Eiseman's allegations of Fourth Amendment violations would have been dismissed. The mandate of *Jacobsen* is explicit—field tests for cocaine performed under factual circumstances similar to those that existed in *Eiseman*

---

[12] Both cases involved a warrantless field test performed upon a white powder that an employee of Federal Express, a private freight carrier, discovered inside a wrapped package in transit. In each case, the Drug Enforcement Agency was notified of the discovery, and an agent was dispatched to investigate it. The agent conducted a field test that revealed the substance discovered as cocaine. The package was then rewrapped and the carrier directed to deliver it to the respective defendant-addressee.

do not constitute a significant expansion of a private search.

Notwithstanding the direct effect that the decision of *United States v. Jacobsen* would have had upon the result we reached in *State v. Eiseman,* — R.I. —, 461 A.2d 369 (1983), the principles we announced in *Eiseman,* including our enunciation of the four factors to be considered in analyzing an expansion case, remain completely viable in non-field-test situations. Our decision in *Eiseman* owes it genesis to the Supreme Court's opinion in *Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2396, 65 L.Ed.2d 410 (1980). Indeed, the doctrines we enunciated in *Eiseman* reflect this court's attempt to provide explicit guidance to a trial justice who is confronted with an expansion case. The Court's recent decision in *United States v. Jacobsen,* 52 U.S.L.W. 4414 (U.S. April 2, 1984) (No. 82-1167), not only is fully consistent with its earlier pronouncement in *Walter* but it actually also incorporates verbatim the doctrines previously announced therein. *Id.* at 4416. In our view, *United States v. Jacobsen* does not in any way reflect the Court's abandonment of the expansion analysis it first defined in *Walter,* but rather represents a clear affirmance by the Court of the theoretical legitimacy of that doctrine in analyzing an expansion case. As Justice Steven's opinion demonstrates, at least six justices of the Court are "of the view that the legality of the governmental search must be tested by the scope of the antecedent private search." *United States v. Jacobsen,* 52 U.S.L.W. at 4416. *United States v. Jacobsen* thus reaffirms the applicability of the *Walter* principles to those situations in which the government expands upon a lawful private search.

The mandate of *United States v. Jacobsen* is that field tests conducted under factual circumstances similar to those present in that case do not constitute a significant expansion of a lawful private search. This appeal does not involve a field test at all. The chemical testing that defendant here challenges occurred, not in the field immediately following a lawful private search, but rather in the state toxicology laboratory one week after its delivery to the State Police. The pills tested by the state in this case were not even in transit—they were toally at rest in State Police hands, having been inventoried and locked in the State Police evidence room for one week prior to their warrantless testing.

Secondly, the actual chemical tests performed by the state toxicology laboratory were substantially more extensive than that executed by the agent in *Jacobsen.* In the present case, the tests performed upon certain contents of the black bag clearly could reveal more than just whether these substances were contraband. Indeed, these tests positively identified the exact chemical composition of a myriad of substances whose identities were previously unknown to the state.[13] This is not a case in which the tests involved could only reveal one fact and "no other arguably 'private' fact." *United States v. Jacobsen,* 52 U.S.L.W. at 4418.

The third major difference between the case at bar and *United States v. Jacobsen,* 52 U.S.L.W. 4414, is that, in *Jacobsen,* it was a virtual certainty that the substances

---

[13] As our later discussion demonstrates, the state police had nothing more than vague, subjective suspicions concerning the identity of certain substances that it received from Alex prior to their chemical testing.

tested contained contraband and nothing else. *Id.* at 4417 n. 17. The evidence in this appeal demonstrates that of all the substances tested by the State Police only one could not have been purchased with a doctor's prescription in a pharmacy in the condition in which it was found. Additionally, most, if not all, of the substances tested here were found in standard medicine bottles and vials. They were clearly not discovered in such a condition — for example, inside four zip-lock glassine bags placed inside a ten inch tube of silver tape in a cardboard box wrapped in brown paper — as would make it a virtual certainty "that [they] contained nothing but contraband." *Id.*

A fourth distinction between *Jacobsen* and the case at bar lies in the fact that in *Jacobsen* the field test represented a genuine law-enforcement technique employed to restrict the possession of a Congressionally condemned substance — cocaine. *Id.* at 4415, 4418. As Justice Stevens's opinion directly acknowledged, the *Jacobsen* decision "is confined to [those cases involving] possession of contraband." *Id.* at 4418 n. 23. Unlike *Jacobsen*, the present case presents no exigent circumstances to legitimize the employment by the State Police of a warrantless law-enforcement technique. Nor does it clearly involve the possession of illegal substances. There is no evidence in the record to indicate that the State Police knew that these substances were unlawfully in the possession of defendant prior to the time that they were delivered to the State Police.

In light of the substantial differences between the facts in *Jacobsen* and those in the case at bar and because of our conclusion that the principles announced in *Eiseman* retain complete vitality in non-field-test expan-

sion cases even subsequent to the *Jacobsen* decision, defendant's Fourth Amendment claims must be analyzed in a manner consistent with the *Eiseman* test.

In *Eiseman* we enunciated four specific factors to consider in determining whether a governmental expansion of a private search is so significant as to invoke the protection of the Fourth Amendment. Applied to this case, these include the following:

1. The police officer's experience and expertise.

2. The question of whether in light of his expertise, the officer had formed an opinion with a reasonable degree of certainty concerning the identity of the substance previously searched by private parties before expanding the search.

3. The extent of the intrusion required to perform the expansion.

4. The question of whether such intrusion impinged upon any further expectation of privacy that remained after the exposure of the contents by private persons. *See State v. Eiseman*, — R.I. at —, 461 A.2d at 377.

Having reviewed the evidence in light of these factors, we are convinced that all four militate against the trial justice's conclusion and in favor of our finding that the state's subsequent toxicological examination was a significant expansion of the private search subject to the protection of the Fourth Amendment.

Lieutenant Reise and his subordinate, Detective Miranda, both had extensive experience with the State Police. Reise was a twenty-one year veteran of the State Police and a ten-year member of its detective division. Miranda

had been employed by the State Police since 1969 and had been working in its detective division since 1974. Additionally, Reise was thoroughly familiar with the proper procedure to follow to obtain a search warrant to advance an investigation.

Despite his expertise, Lieutenant Reise was unable to identify with a reasonable degree of certainty those substances that he had received from Alex without further testing. His testimony is replete with admissions that he sent samples to the state lab because he simply did not know what they were. In spontaneous response to two questions posed by the prosecutor upon direct examination, Lieutenant Reise gave virtually identical answers to explain why he ordered the testing: "I had no idea what it was" (papaveretum); I sent it "[f]or the same reason I just didn't know what it was" (lidocaine). And on subsequent cross-examination, Lieutenant Reise reaffirmed the fact that he ordered the chemical analysis of certain substances precisely because he lacked knowledge of their identity. He stated that the reason he had had the state lab perform the testing was because there were "some unknowns in there that I couldn't identify just through a Physicians Desk Reference." Although he did testify that he felt certain substances delivered by Alex were "a contraband substance or something of that nature," a full reading of his testimony convinces us that these statements were nothing more than an expression of his own vague, subjective suspicions about their identity. These statements clearly do not support a finding that Lieutenant Reise was able to identify the substances delivered by Alex with any reasonable degree of certainty without the aid of the state toxicological tests.

The final two *Eiseman* factors we shall consider in tandem. The extent of the intrusion and whether it impinged upon a further expectation of privacy retained by defendant are two integrally related factors. If defendant retains a constitutionally protected expectation of privacy in the items delivered to the state by private parties, and the state intrudes upon that expectation of privacy, it does so subject to the proscription of the Fourth Amendment.

In this case defendant originally possessed a reasonable expectation of privacy in the pills and other contents of the black bag. These items were originally found in an opaque black bag inside a metal box in a locked closet in defendant's home. The fact that they were unexpectedly seized, inspected, and delivered to the State Police by a private party does not alter defendant's legitimate original expectation of privacy. *Walter v. United States,* 447 U.S. at 658-59, 100 S. Ct. at 2402-03, 65 L.Ed.2d at 418-19.

"[T]he Government may not exceed the scope of the private search unless it has the right to make an independent search." *Id.* at 657, 100 S. Ct. at 2402, 65 L.Ed.2d at 418. Consequently, unless the private inspection and testing of the black bag and its contents was so complete as to be virtually coextensive with the State Police search, it only partially frustrated defendant's original expectation of privacy. "It did not * * * strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." *Walter v. United States,* 447 U.S. at 659, 100 S. Ct. at 2403, 65 L.Ed.2d at 419.

The facts of this case readily demonstrate that the state's toxicological examination of the contents of the

black bag did exceed the scope of the private tests performed by Bio-Science Laboratories at the request of Dr. Stock. In addition to the chemical analysis of both the blue liquid and the white powder performed by Dr. Stock, the state toxicologist chemically analyzed five samples of pills, including three capsules and two tablets, and two samples of ampules that were never tested by Dr. Stock. The state concedes that one of these capsules, a red capsule marked "Lilly F-40," could not have been identified by a simple sight examination.[14]

The state therefore did intrude upon a further expectation of defendant's privacy. The extent of the state's intrusion is significant because, without it, the initial view of the objects tested produced only an inference of criminal conduct by defendant. *See Id.* at 657, 100 S.Ct. at 2402, 65 L.Ed.2d at 418; *see also United States v. Jacobsen,* 52 U.S.L.W. 4414 (U.S. April 2, 1984) (No. 82-1167). In this case, as in *Walter,* the state exceeded the scope of the private search by employing chemical or mechanical means to reveal the hidden nature of these objects. This governmental activity represents a significant expansion of the private search because it positively identified the unknown composition of the pills delivered to the state police. *See State v. Morgan,* 32 Wash. App. 764, 768, 650 P.2d 228, 231 (1982). This additional investigation, being "necessary in order to obtain the evidence which was to be used at trial," *Walter v. United States,* 447 U.S. at

---

[14] Although labeled "Lilly F-40" (a capsule which would normally contain seconal), this capsule as we have noted, was found to contain secobarbital, amobarbital, and cyclizine. This same capsule could not have been bought at a drug store in the condition in which it was found.

654, 100 S. Ct. at 2400, 65 L.Ed.2d at 416, was an independent search subject to the Fourth Amendment.

Since we hold that the state's subsequent chemical analysis of certain contents of the black bag was a significant expansion of the private search and that there were no exceptions to the warrant requirement, defendant's conviction must be reversed. In a case in which "the authorities have not relied on what is in effect a private search, * * * [they] presumptively violate the Fourth Amendment if they act without a warrant." *United States v. Jacobsen*, 52 U.S.L.W. at 4416. The state may not significantly expand the scope of a private search unless it obtains a warrant. *State v. Eiseman*, — R.I. at —, 461 A.2d at 381.

III.

Even were we to hold that defendant's Fourth Amendment rights had not been violated by the State Police's chemical testing, our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained through the state's toxicological examination of the contents of the black bag be suppressed. Article I, sec. 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding that the toxicological testing was an illegal search. That section constitutes "bona fide separate, adequate, and independent grounds," *Michigan v. Long*, — U.S. —, 103 S.Ct. 3469, 3476, -- L.Ed.2d — (1983), upon which we base our decision to suppress the admission of evidence procured by the state's toxicological analysis.

This court has previously recognized that the citizens of Rhode Island possess "a double barrelled source of

protection which safeguards their privacy from unauthorized and unwarranted intrusions: the [F]ourth [A]mendment of the Federal Constitution and the Declaration of Rights which is specified in the Rhode Island Constitution." *State v. Sitko,* — R.I. —, —, 460 A.2d 1, 2 (1983) (quoting *State v. Luther,* 116 R.I. 28, 29, 351 A.2d 594-95 (1976)). This dual safeguard flows directly from the United States Supreme Court's explicit acknowledgement of the "right of state courts, as final interpreters of state law, 'to impose higher standards on searches and seizures than [those] required by the Federal Constitution,' even if the state constitutional provision is similar to the Fourth Amendment." *State v. Benoit,* — R.I. —, —, 417 A.2d 895, 899 (1980) (quoting *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730, 734 (1967)).

Article I, sec. 6, of our constitution states that

> "[t]he right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched, and the persons or things to be seized."

In interpreting this section, we have previously recognized our right to "establish a higher standard of protection [for a criminal defendant] and [that which he] might otherwise be afforded under the [F]ourth [A]mendment." *State v. Ahmadjian,* — R.I. —, —, 438 A.2d 1070, 1082 (1981) (quoting *State v. Luther,* 116 R.I. 28, 29, 351, A.2d 594, 595 (1976)); *State v. Maloof,* 114 R.I. 380, 389, 333 A.2d 676, 681 (1975). We have exercised this right to require stricter compliance with the provisions of our electranic eavesdropping statute than the Fourth Amendment

requires of a nearly identical federal statute, *see State v. Maloof,* 114 R.I. at 389-91, 333 A.2d at 681-82, and to afford greater protections than those provided under the Fourth Amendment to a criminal defendant whose automobile has been subjected to a warrantless search and seizure. *State v. Benoit,* — R.I. at —, 417 A.2d at 900-01.

Our decisions to afford additional protections against unreasonable searches and seizures to a criminal defendant under art. I, sec. 6, beyond those provided to him under the Fourth Amendment comports fully with our state's early legislative enactment of the exclusionary rule. On May 5, 1955, the exclusionary rule became the law of the State of Rhode Island with the enactment of P.L. 1955, ch. 3590, § 1.[15] This law was enacted six years before the exclusionary rule was made mandatory upon the states through the Fourth and Fourteenth Amendments, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and reflects our legislature's clear intention to provide independent vitality to art. I, sec. 6, in guarding the privacy interests of the citizens of this state.

Public Laws 1955, ch. 3590, § 1 was our legislature's immediate response to a prior holding of this court. In *State v. Olynik,* 83 R.I. 31, 113 A.2d 123 (1955), it was held that art. I, sec. 6 of our constitution did not require the supression of evidence that was obtained in an illegal search. The enactment of G.L. 1956 (1969 Reenactment) § 8-19-25 within only six weeks of the *Olynik* decision ef-

---

[15] Public Laws 1955, ch. 3590, § 1 provides in pertinent part that "no evidence shall be admissible where the same shall have been procured, by, through or in consequence of any illegal search and seizure as prohibited in section 6 of article I of the constitution of the state of Rhode Island."

fectively reversed this result once and for all in Rhode Island.

In *Benoit* we invalidated the warrantless search of an automobile which took place four hours after it had become immobile. In that case, we held that art. I, sec. 6, reflects the intent of the framers of our constitution to declare all warrantless searches and seizures unreasonable. *State v. Benoit,* — R.I. at —, 417 A.2d at 901. "Only if circumstances render procurement of a warrant impracticable and if the needs of society demand swift action, does art. I, sec. 6 permit the temporary limited infringement of an individual's right of privacy." *Id.* We stated further in *Benoit* that once the vehicle had lost its mobility, defendant's privacy interest had regained its paramount importance and should not have been infringed upon without the authorization of a neutral magistrate. *Id.*

In the case at bar, an even greater period of immobility than that present in *Benoit* had elapsed between the state's initial warrantless "seizure" of evidence and its subsequent search. The black bag and its contents were delivered to the State Police on March 13, 1981. At that time, this evidence was completely and exclusively under the control of the State Police. It remained under that agency's total dominion in a locked evidence room until its subsequent chemical analysis. The toxicological examinations did not occur until March 20, 1981. By March 20, 1981, the black bag and its contents had been fully immobile for one week.

Under these circumstances, it is hard to conceive of a more practicable situation in which to obtain a warrant. The evidence was fully at rest in the state's hands. "[T]he

needs of society [did not] demand swift action * * * and the [defendant's] privacy interest had regained its paramount importance." *Id.* The state's failure to procure a search warrant here consequently cannot withstand constitutional scrutiny. The admission of such evidence by the trial justice was therefore error.

IV

One final comment is in order in response to the Chief Justice's concurrence in which he concludes that the trial justice erroneously denied defendant's motion for judgment of acquittal on count 1 of the indictment. My brethren—Justices Kelleher, Weisberger, and Shea—and I see no such error in the denial of this motion.

In considering a motion for a judgment of acquittal, the trial justice and this court on review, are bound to consider only that evidence that the prosecution claims is capable of generating proof beyond a reasonable doubt. As such evidence is to be viewed in the light most favorable to the prosecution, the trial justice and the reviewing court must draw from such evidence all reasonable inferences that are consistent with the accused's guilt. At this juncture, neither the weight of the evidence nor the witnesses' credibility are to be considered. *State v. Romano,* — R.I. —, —, 456 A.2d 746, 756-57 (1983). When considering such a motion, the appellate court, as well as the trial court, is bound to look at all such evidence without regard to whether it was properly admitted into evidence. *State v. Maloney,* 111 R.I. 133, 139, 300 A.2d 259, 262-63 (1973).

Applying these principles to the evidence, we would first point to the testimony of Dr. George F. Cahill, a mem-

ber of the faculty at Harvard University School of Medicine. He told the jury that the sole cause of both the 1979 and the 1980 Christmastime comas was the external injection of insulin into the body of defendant's wife.

Maria, the maid, told the jury that defendant was thoroughly familiar with syringes and hypodermic needles, which he used to inject himself with vitamins, and had at one time given his wife an injection of vitamins. The maid also testified that when defendant described his wife's activities on the afternoon of December 27, 1979 to a doctor, he lied.

Ample testimony was presented indicating that during the 1979 Christmas visitation to Clarendon Court defendant had the opportunity to be alone with his wife in her bedroom.

One of the witnesses for the prosecution was the "other woman" in defendant's life, Alexandra Isles. In 1979 she was living in New York City, was divorced, and was by her own admission well off financially. She had met defendant in April 1978, and by March 1979 their relationship, in her words, had become "intimate." During the spring of 1979, the couple began speaking in terms of marriage, and defendant was given six months in which he was both to obtain a divorce and be married to Alexandra. The absolute beginning of the six-month period is somewhat indefinite, but the time limit could have been up at the start of December.

With all due deference to the Chief Justice, we believe that when one views the evidence to which we have just alluded in light of the principles enumerated earlier, the reasonable inferences drawn from such evidence support

a reasonable conclusion that in late December 1979 the defendant, mindful of the ultimatum of his intended bride, decided to take matters into his own hands, one of which held a syringe containing a copious quantity of insulin, and so injected the contents of the syringe into his wife with the intent that she should expire so that he would be free to marry Alexandra.

V

For the reasons stated, the defendant's appeal is sustained, the judgment of conviction appealed from is vacated, and the case is remanded to the Superior Court for a new trial on both counts.

Chief Justice Bevilacqua, concurring in part and dissenting in part. I concur with my colleagues with respect to the issues considered. However, I am of the opinion that the trial justice erred in not granting defendant's motion for a judgment of acquittal on the first count of the indictment.

In considering a motion for a judgment of acquittal,[16] the trial justice must review the evidence in a light most favorable to the state, drawing all reasonable inferences therefrom consistent with the defendant's guilt. The trial

---

[16] The state argues that because defendant did not object to the omission of an instruction on inference stacking, the rule of the law of the case bars our review of this issue. This argument is without foundation. When a court properly instructs a jury on the standards of reasonable doubt, no further instruction on inference stacking is necessary. *See State v. Roddy*, — R.I. —, —, 401 A.2d 23, 35 (1979). A challenge to the sufficiency of the evidence is properly made by a motion for a judgment of acquittal. On appeal we are bound by the same standards as the trial justice. *State v. Collazo*, — R.I. —, —, 446 A.2d 1006, 1011 (1982).

justice may consider neither the weight of the evidence nor the credibility of the witnesses. *E.g., State v. Austin,* — R.I. —, —, 462 A.2d 359, 364 (1983); *State v. Armstrong,* —R.I. —, —, 446 A.2d 1043, 1044 (1982). If the evidence fails to establish the defendant's guilt beyond a reasonable doubt, the trial justice must grant the motion. *State v. Gazerro,* — R.I. —, —, 420 A.2d 816, 827 (1980). On appellate review, this court is bound by the same standards as the trial justice. *State v. Collazzo,* — R.I. —, —, 446 A.2d 1006, 1011 (1982).

An assault is an "unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness." *State v. Baker,* 20 R.I. 275, 277, 38 A. 653, 654 (1897); *see also State v. Pope,* — R.I. —, —, 414 A.2d 781, 788 (1980). In order to establish the offense of assault with intent to murder, the state also had to prove that defendant had the specific intent to kill his wife. *State v. Fournier,* — R.I. —, —, 448 A.2d 1230, 1233 (1982). The state need not prove an express intent to kill; a defendant's conduct may establish the requisite legal malice for a jury to infer an intent to kill. *State v. Charette,* — R.I. —, 434 A.2d 280, 283 (1981); *see State v. McGranahan,* — R.I. —, —, 415 A.2d 1298, 1302 (1980).[17] However, in order to meet its burden, the state had to prove every element of the offense of assault with intent to murder beyond a reasonable doubt. *State v. Roddy,* — R.I. —, —, 401 A.2d 23, 35 (1979).

---

[17] Malice is "an unjustified disregard for the possibility of death or great bodily harm and an extreme indifference to the sanctity of human life." *State v. McGranahan,* — R.I. —, —, 415 A.2d 1298, 1302 (1980).

Moreover, we have said that no valid distinction exists between the probative force of direct and of circumstantial evidence. Any fact established by circumstantial evidence must be established as sufficiently and as completely as by positive, direct evidence. *State v. Roddy*, — R.I. at —, 401 A.2d at 35; *State v. Rose*, 112 R.I. 402, 407, 311 A.2d at 281, 284 (1973). In any case, the state meets its burden when all evidence, direct or circumstantial, and all legitimate and reasonable inferences drawn therefrom, establish a defendant's guilt beyond a reasonable doubt. *State v. Gazerro*, — R.I. at — 402 A.2d at 828.

In addressing this issue, there is no need to repeat all the evidence recited in the majority opinion.

Reviewing the evidence in a light most favorable to the state, I believe that the state failed to sustain its burden of proof in regard to count 1. An examination of the record reveals that the state relied upon two basic inferences to establish defendant's guilt: the two comas suffered by Martha von Bulow and the existence of a black bag that at various times was found to contain insulin and syringes.[18] The evidence revealed that on the evening of December 26, 1979, Martha von Bulow became weak and uncoordinated and had to be escorted to her bedroom, where she remained alone with defendant. The next morning, after noticing that Mrs. von Bulaw had not awakened at her usual hour, Miss Schrallhammer at

---

[18] On appeal, defendant challenged the sufficiency of the evidence by asking us to review all of the evidence presented at trial. The defendant, however, misconceives the nature of a motion for a judgment of acquittal. The "sole target" of review is the sufficiency of the evidence upon which the state relies to establish a defendant's guilt. *State v. Crescenzo*, 114 R.I. 242, 257, 332 A.2d 421, 430 (1975).

tempted to check on her but was advised by defendant that Mrs. von Bulow had a sore throat and should not be disturbed. Nonetheless, Miss Schrallhammer checked on Mrs. von Bulow and was unable to arouse her. The defendant, nevertheless, failed to call a doctor until several hours later, at which time he failed to describe her condition adequately. Miss Schrallhammer felt that the statements made by defendant to the doctor that his wife was an alcoholic had been drinking the night before, and had been out of bed earlier that day were "not true." Four hours subsequent to the first call, defendant again telephoned the doctor and requested that he come to the house. Doctor Gailitis found Mrs. von Bulow in a comatose state. Shortly after his arrival, Mrs. von Bulow experienced cardiac arrest and had to be resuscitated by the doctor. Some medical testimony revealed that the cause of the coma was exogenous insulin.[19]

Because there is no direct evidence of defendant's guilt, the state had to prove its case by the use of circumstantial evidence. The state also had to rely upon a pyramiding of inferences to establish defendant's guilt. From the facts presented, the prosecution asked the jury to draw two primary inferences: that both comas were caused by exogenous insulin and that the black bag and its contents belonged to defendant. From these primary inferences, the jury was asked to draw the secondary inference that defendant was guilty of assault with intent to murder.

---

[19] Medical opinions concerning the cause of Martha von Bulow's comas were elicited through the use of hypothetical questions posed to medical expert witnesses. The state concedes that the hypothetical question posed to its primary expert, Dr. Cahill, was factually erroneous regarding the time of one of the glucose pushes. In the context of my analysis of this issue, however, I shall assume that this erroneous information did not influence Dr. Cahill's conclusion.

It is well settled that if an inference is the only reasonable one to be drawn from the established facts, then a secondary inference may be drawn from the primary inference. However, when the facts from which it is drawn are susceptible of another reasonable inference, it must be rejected as lacking probative force. *In re Derek,* — R.I. —, —, 448 A.2d 765, 768 (1982); *Waldman v. Shipyard Marina, Inc.,* 102 R.I. 366, 373-74, 230 A.2d 841, 845 (1967). "In this way the ultimate inference rests upon a foundation that logically has the probative force of established fact; were it otherwise, the ultimate conclusion * * * would rest on no more than conjecture and surmise." *Carnevale v. Smith,* — R.I. —, —, 404 A.2d 836, 841 (1979). To simplify this principle, the underlying, proven facts exclusively support the primary inferences, which support the secondary inferences in the same manner that each level of a pyramid supports the level immediately above it.

In regard to the second coma, the facts viewed in a light most favorable to the state support the primary inference that the coma was caused by exogenous insulin and that the black bag and its contents belonged to defendant. From these inferences, the secondary inference that defendant injected his wife with insulin may be drawn.

It is my opinion that the state failed to sustain its burden of proof on count 1. Unlike the facts surrounding the second coma, no "black bag" was involved in the first coma. Maria Schrallhammer testified that she first discovered the bag in February 1980. Indeed, insulin and needles were not seen until November 1980—almost eleven months after the first coma. The state cannot use facts

supporting count 2 to establish the element of assault in count 1.

The state itself referred to the bag and its contents as the "key" to this case. Nevertheless, because the existence of the black bag and its contents cannot be established until November of 1980, this fact cannot serve to establish the inference that the defendant owned these items at the time of the first coma. Without this inference as its foundation, the secondary inference of guilt must fall. Accordingly, the defendant's guilt is not an exclusive inference to be drawn from the facts. The facts surrounding count 1 at most support a conclusion that the defendant acted in an unhusbandlike, rather than in a criminal, manner. I can only conclude that his conviction rests, not upon proof beyond a reasonable doubt, but upon speculation and conjecture. *See State v. Alexander,* — R.I. —, —, 471 A.2d 216, 219 (1984).

I would therefore sustain the defendant's appeal in regard to count 1 of the indictment, vacate the judgment of conviction, and remand to the Superior Court with direction to enter a judgment of acquittal on count 1.

APPENDIX B

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

NEWPORT, SC. SUPREME COURT

C.A. 82-462

STATE OF RHODE ISLAND
-VS-
CLAUS VON BULOW

PETITION TO REARGUE

Now comes the State of Rhode Island, pursuant to Rule 25, Rhode Island Supreme Court Rules of Appellate Procedure, and moves to reargue the above-captioned case. Mindful that reargument will be granted only if the Court has overlooked or misapprehended matters raised in the original briefs or argument, *Brimbeau v. Ausdale,* 120 R.I. 670, 389 A2d 1254 (1979), the State respectfully submits:

1. The Court has overlooked or misapprehended certain facts in the testimony of Lt. John Reise which show that he was virtually certain of the contents of the pill capsules, ampules and tablet before they were verified by the toxicology lab. The blue tablet was impregnated with the words "Roche 10 Valium." The orange and yellow capsule had DALMANE written on it, both other capsules were marked with pharmaceutical numbers which Lieutenant Reise looked up in the *Physicians Desk Reference* and identified as amytal and seconal. The unopened ampoules bore the manufacturer's labels, "Lidocaine" and "Papavertum." Thus, the State respectfully submits that Lieutenant Reise's initial identification was much more than vague, subjective suspicion. The toxicology merely confirmed his previous identification, which but for one capsule, was entirely correct.

2. The Court misapprehended Lieutenant Reise's responses regarding the identity of the six items that had not already been tested by the family. Regarding the pills, Lieutenant Reise indicated that he had made a preliminary determination of each before sending it to the state toxicologist. The testimony was:

Q. "Could you tell us what various kinds of pills were found, or describe the various kinds of pills you found in that vial.

A. There was one blue capsule which had the word 'Lilly F 33' on it, which, through the Physician's Desk Reference, indicated that it was Amytal.

Q. What other pills?

A. Well, there was 31 orange and yellow capsules identified as Dalmane.

Q. Identified as Dalmane because you looked in the PDR and it looked like the picture in the PDR for Dalmane?

A. (The witness then nodded his head in the affirmative.)

Q. Were there any other pills in that container?

A. One red capsule marked Lilly F 40, which was subsequently identified as Seconal.

MR. SHEEHAN: Objection.

THE COURT: As what?

THE WITNESS: Seconal.

Q. And when you say "subsequently identified," do you mean you identified it as Seconal?

A. Yes.

Q. Again, by using the Physicians' Desk Reference?

A. (The witness then nodded his head in the affirmative.)

Q. Anything else in that vial?

A. 31 light blue tables identified as Valium."

(Also see Tr. Vol. IV, p. 665.)

The State submits that the testimony highlighted by the Court in *State v. von Bulow,* slip op. at 46, referred to his lack of knowledge of the chemical properties of the Papavertum and Lidocaine and did not mean that he was unable to identify them.

3. In reviewing Lieutenant Reise's testimony, the Court overlooked the numerous times he stated his belief that the items sent for testing were contraband. (4 Tr. 660, 664, 667). Even von Bulow's trial counsel conceded "I think the testimony is clear here that at least with respect to all of the drugs but that one pill, the DALMANE, or those 31 Dalmane pills, that we are dealing with suspected contraband." (4 Tr. 712). In challenging Lieutenant Reise's conclusion, the Court observed that, "most if not all the substances tested here were found in standard medicine bottles and vials" *State v. von Bulow,* slip op. at 44. The Court overlooks the fact that all of the pills sent for testing on March 20, were found in *one* pill vial. The prescription on the bottle was made out to C. von Bulow and was for Dalmane. However, this pill vial contained 64 pills, of 4 different varieties. The State submits that under these circumstances, Lieutenant Reise's belief that they were unlawfully possessed was reasonable. See: R.I.G.I. 1956 (1982 reenactment) §21-28-3.29.

4. In commenting on the lawfulness of the toxicological examination of the one Valium pill sent for testing on April 23, 1981, and in criticizing the State Police because they had control over it for 6 weeks yet failed to get a search warrant before

testing it, the Court overlooks the fact that the pill was seized by Sgt. Miranda only 2 days earlier on April 21, 1981 and during the course of a search consented to by the defendant.

5. In finding the chemical testing of 4 capsules and 2 ampules unlawful under the R. I. Constitution, the Court emphasized that they were held by the State Police, most for one week, before being sent for chemical analysis. The Court, however, overlooked the fact that this time lag, much less any potential significance it might have, was neither presented in the testimony nor argued in the Motion to Suppress. It is difficult to see how this Court can find the ruling of the Trial Justice clearly erroneous based on a fact that was never presented to him.

6. In determining whether the admission of the toxicology reports on 4 pills and 2 ampules, was harmless, the Court stressed the facts that: (1) these drugs had tranquilizing or anesthetizing properties and (2) this was a significant element in the State's case. *State v. von Bulow,* slip op. at 37. The Court apparently overlooks the cumulative and collateral nature of this evidence. The drugs and potions, previously tested by the family and lawfully admitted into evidence also had tranquilizing and anesthetizing effects. The presence of tranquilizing drugs in the black bag and in Mr. von Bulow's effects, was already established by evidence of the family's testing. This was admitted earlier and quite apart from the toxicology results acquired by the State. In fact, one of the two passages the Court quotes from the prosecutor's closing argument, refers only to the powder previously tested by the family and not to the pills or ampules at all. *State v. von Bulow,* slip op. at 37, 38.

Moreover, the State submits that the Court misapprehends the contribution of the toxicological

examination of the 4 pills and 2 ampules to the State's case. Lieutenant Reise had already testified as to his preliminary identification of them. The toxicologist merely confirmed these identifications with the exception of one red capsule. Although the capsule contained a mixture of drugs, the murder of Martha von Bulow was twice attempted by injection of exogenous insulin, not by a mixture of drugs. Although the presence of the mixture of drugs in the red capsule may be consistent with a surreptitious administration of drugs, the same may be said regarding the presence of liquid valium and powder amobarbital.

Thus, the State contends that after the lawful admission of evidence that the family had discovered; (an insulin encrusted needle and tranquilizing drugs in von Bulow's black bag and personal effects) after Lieutenant Reise had identified the pills, as valium, amytal, seconal, and Dalmane; and the ampules as Lidocaine, and Papavertum, after the compelling medical testimony attributing her condition to the administration of exogenous insulin and after convincing testimony regarding opportunity and motive, the admission of toxicology reports on 4 pills and 2 ampoules was indeed harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 23-24 (1967).

7. Finally, the Court has overlooked the fact that at trial, the defendant never based this claim to suppression upon the R. I. Constitution. Nor did his appellate counsel advance such and argument.[1]

---

[1] Although appellate counsel relied heavily on Art. 1, § 6 R.I. Constitution in challenging the private search and Lt. Reise's actions when Alex first brought him the black bag, he did not raise it in challenging the admission of the toxicology reports. His only reference here was to say that "even a co-extensive prior search should not be deemed to eliminate the warrant requirement under the Fourth Amendment—and especially under Article 1, § 6 of the Rhode Island Constitution." *Appellant's Brief* at 74, 75.

If he had, the State would have quickly pointed out that it was not preserved for appellate review. Thus, this Court has found the decision of Judge Needham clearly erroneous under principles never presented to him at the argument nor advanced on appeal.

Quite apart from the matters the State suggests the Court has overlooked or misapprehended, several compelling reasons justify reargument.

1. The impact of the U.S. Supreme Court's recent decision, *U.S. v. Jacobsen,* 52 U.S.L.W. 4414 (April 2, 1984) is so significant that the State should have the opportunity to fully brief and argue its application to the case at bar. Although, this Court places substantial reliance on some of its principles in deciding the case at bar, certain other reasoning was entirely overlooked. For example, all nine members of the *Jacobsen* Court recognized that the private search doctrine and the plain view doctrine are closely related. However, this Court summarily rejected the State's plain-view argument. *State v. von Bulow,* slip op. at 36. Moreover, all nine Justices agreed that the field test conducted in *Jacobsen* did not violate the Fourth Amendment, Id at 4417. Additionally, although this Court stressed the lack of exigent circumstances as a reason to require a search warrant, *State v. von Bulow,* slip op. at 53, exigency played no part in the decision of the United States Supreme Court in *Jacobsen.*

2. The Court's decision applying the exclusionary rule to chemical testing on evidence given to police by private parties is confusing to apply. Must police officials now seek a search warrant to test for blood on articles brought to them by private parties? Must the police seek a warrant to test a gun they believe was the instrumentality

of a crime if that gun is surrendered to them by a private individual? If a private individual seizes, without reading, documents he believes will incriminate another person in a crime, must the police get a search warrant before they can read them? Although these questions may extend the holding of *von Bulow* to its other limits, they are fairly raised and require an answer.

One of the main criticisms of the exclusionary rule is the difficulty it presents to an ordinary police officer in attempting to gain evidence of a crime without invading legitimate privacy interests. The permuatations and intricacies of the exclusionary rule provoke conflicting interpretations by the most learned commentators. Thus, the State submits that the courts have a duty to articulate their pronouncements on the subject in a way that can be easily anticipated, understood and applied. The State suggests that nothing in Lt. Reise's 21 years of experience with the State Police would have warned him that he should have sought a search warrant for a toxicological anlysis of readily identifiable pill capsules and ampules, given to him by a private party, and which he suspected to be contraband. See: *Illinois v. Andreas,* 51 U.S.L.W. 5157, 5159 (1983) Thus, the State submits that this Court's decision could not have been anticipated by an ordinary police officer. Indeed, the principles are difficult to apply and, ultimately, it raises more questions than it answers.

3. This Court has chosen to adopt a very strict application of the Exclusionary Rule under the Rhode Island Constitution. This is particularly perplexing in view of the fact that the United States Supreme Court, the genesis of the rule and ultimate arbiter of federal constitutional law, appears to be reexamining the Rule's contribution to justice and the integrity of the Ameri-

can judicial system. *Massachusetts v. Sheppard,* C.A. 82-963, argued January 17, 1984.

The State respectfully requests the opportunity to argue that this strict interpretation of Rhode Island Constitution, Article I, § 6 is neither appropriate nor advisable. It excludes relevant evidence gained by police officers in good faith. It permits a man to go free even though his guilt is proven and accepted. It undermines public confidence in the Criminal Justice system as a means of punishing wrongdoers and, finally, it violates the trust of the victim, who by submitting her demand for justice to the Court's of this State, exposed herself to the most villifying innuendo, only to have the entire proceeding nullified by a technicality.

4. Lastly, the State would point out that in its mandate, the Court vacated the defendant's convictions on both Count I and Count II. The toxicological results, however, were relevant only to the pills and ampules found in the black bag after the 1980 murder attempt. (Count II) Although Maria saw the black bag in the defendant's travel bag two months after the 1979 murder attempt, her observations included 3 vials which she labeled "pills", "powder" and "paste". The nature of these items were identified no further by family or state testing. Clearly, if any of these pills in the vial had tranquilizing effects that was not evident and could have no effect on the jury's verdict on Count I.

   Therefore, the State submits that the positive identification of 4 pills and 2 ampules discovered in von Bulow's black bag only after the 1980 murder attempt could not have contributed to his conviction on a murder attempted in 1979. Thus, its impact, if any, on the integrity of his conviction on Count I was harmless beyond a reasonable doubt and the judgment of conviction as to

Count I should be reinstated subject to a remand on the records held by Attorney Kuh.

For all the above reasons, the State respectfully requests that the petition to reargue be granted.

Respectfully submitted,

STATE OF RHODE ISLAND
DENNIS J. ROBERTS II
ATTORNEY GENERAL

/s/ Susan E. McGuirl
DEPUTY ATTORNEY GENERAL

/s/ Sharon O'Keefe
SPECIAL ASSISTANT
ATTORNEY GENERAL
CHIEF, APPELLATE DIVISION

CERTIFICATION

I hereby certify that a true copy of the foregoing Petition to Reargue was forwarded to Alan M. Dershowitz, Esq., 20 Elmwood Avenue, Cambridge, Massachusetts 02138 and John A. MacFayden, III, Esq., The Remington Building, 91 Friendship Street, Providence, Rhode Island 02902, on the 2nd day of May, 1984.

/s/ Barbara A. Russo

APPENDIX C

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Supreme Court No. 82-462-C.A.

STATE

v.

CLAUS VON BULOW

O R D E R

May 24, 1984

After our opinion in the above case was published, the state filed a petition to reargue. We have carefully considered the reasons upon which the petition is based, and we are of the opinion that only one reason deserves any comment, and none of the reasons warrant a reargument.

The court in its opinion faulted the State Police for their failure to obtain a search warrant before the police forwarded a collection of "tranquilizing and anesthetic drugs" found in the defendant's black bag to the state toxicologist for examination and analysis. Through inadvertence, the court included within its description of the collection the following: "10. One blue pill marked Valium Roche-10 found to contain diazepam (Valium)." Concededly, this particular pill was obtained by the State Police on April 21, 1981, while searching, with the defendant's consent, the family's Newport home. However, this oversight in no way justifies the failure to obtain a warrant before the other nine items were sent to the toxicologist.

For purposes of achieving clarity, the opinion which precedes this order has been revised in conformity with this response before the print goes to press.

The petition for reargument is denied.

APPENDIX D

1. United States Constitution, art. III, sec. 2 reads in pertinent part:

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution . . ."

2. United States Constitution, amend. IV, reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. United States Constitution, amend. XIV, sec. 1, reads in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. 28 U.S.C. sec. 1257, reads in pertinent part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) * * *
>
> (2) * * *
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

5. Rhode Island Constitution, art. I, sec. 6, reads:

> "The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched, and the persons or things to be seized."

APPENDIX E

TORO LAW ASSOCIATES
Incorporated
Attorneys and Counselors At Law
1808 Industrial Bank Building
Providence, Rhode Island 02903-2375

Eugene F. Toro
Peter A. DiBiase
Richard A. Gonnella
Mortimer C. Newton

Telephones
Area Code 401
351-7752
831-5020
421-1511

April 5, 1984

Walter J. Kane, Clerk
Supreme Court of Rhode Island
250 Benefit Street
Providence, Rhode Island 02903

Re: *State v. Claus von Bulow*
No: 82-462 C.A.

Dear Mr. Kane:

Pursuant to our obligation to apprise the Court of new relevant authorizaties, we call to the Court's attention the Supreme Court decision of April 2, 1984 in *United States v. Jacobsen* (No: 82-1167),[1] where the Court upheld a warrantless field test confirming the virtually certain presence of contraband. *Jacobsen* was a case where a Federal Express package, examined by company officials after it had been accidently opened in shipping, was found to contain white powder packaged in such a manner as to make it "virtually certain" that the powder was contraband and where the subsequently conducted field test was

---

[1] The paginations in this memorandum refer to the lexis slip opinion.

designed to determine *only* whether or not the powder was, in fact, contraband. In the context of these facts, the Court held that "[u]nder these circumstances, the safeguards of a warrant [before conducting a further test] would only minimally advance Fourth Amendment interests." *Slip Op.*, p. 14.

The Court emphasized, however, that "where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances." *Slip Op.* p. 14, n.28.

Indeed, it went on to say — in language uniquely applicable to the facts of the *von Bulow* case — that

> We do not suggest, however, that any seizure of a small amount of materials is necessarily reasonable. An agent's arbitrary decision to take the 'white powder' he finds in a neighbor's sugar bowl, or his medicine cabinet, and subject it to a field test for cocaine, might well work an unreasonable seizure." *Id.* (emphasis added).

None of the relevant factors which justify the *Jacobsen* field tests are present in *von Bulow;* on the contrary, the factors present in *von Bulow* all vitiate the justifications suggested in *Jacobsen.*

1. In *Jacobsen,* the private search resulted from a lawful opening of a package for the purpose of complying with a "written company policy regarding insurance claims", *Slip. Op.* p. 3; accordingly, the Court found that the Federal Express employees were "lawfully in possession of the package". *Slip Op.,* p. 10, n.17. In *von*

Bulow, the "private" searches resulted from unlawful trespasses conducted "for the specific purpose of obtaining information which could be used in a criminal prosecution", Trial Judge's findings, at 4 T.701;[2] hence the private parties were unlawfully in possession of the black bag when it was turned over to the State Police.

2. In *Jacobsen*, the defendants "concede[d] that the agents had probable cause to believe the package contained *contraband*", *Slip. Op.*, p. 11, n. 20, and the Court explicity stated that "[its] discussion . . . [was] confined to possession of contraband." *Slip. Op.*, p. 12, n. 23. In *von Bulow*, the defendant makes no such concession, the Trial Judge made no such finding, and there was — in fact and in law — *no* probable cause to believe that the black bag, or any of its contents, contained contraband of any sort. See *Appellant's Reply Brief* at p. 29, n. 67.

3. In *Jacobsen*, there was a legitimate law enforcement need to conduct an "on the spot" field test so as to be able to catch the persons to whom the package or contraband was addressed, see *Slip. Op.*, p. 3; in *von Bulow*, there was not even an arguable claim of exigency since the black bag rested in the Evidence Room for a *full week* before Lt. Reise selected the items to be sent for arbitrary testing. *See*, 16 T. 2004-5, 4 T. 659.

4. In *Jacobsen*, the private search destroyed no evidence and the field test destroyed "only a trace amount of

---

[2] *Jacobsen* does not purport to change federal constitutional law insofar as it relates to purely private searches. *See, Slip.Op.*, p.4 regarding reasons for granting certiorari. In *Jacobsen* "the lower Courts found no governmental involvement in the private search, a finding not challenged here." *Slip.Op*, p.6,n.10. In *von Bulow* the trial court found that the purpose of the "private" search was to secure evidence for a public prosecution. *See gen'ly, Appellant's Brief*, pp.57-69.

the material" so that no loss was even noticeable, *see, Slip. Op.*, p. 14; in *von Bulow*, the extensive laboratory testing was the culmination of a process by which critical evidence of a highly relevant and potentially exculpatory nature was destroyed.

5. In *Jacobsen*, the test "could reveal nothing about non-contraband items," nor anything "of special interest" and could in fact determine only whether or not the powder — which was "virtually certain to be contraband" — was indeed cocaine, *Slip. Op.*, p. 12-14; in *von Bulow*, the extensive laboratory testing procedures were designed to determine the exact nature of the items searched and could, and did, according to the prosecution, reveal something "of special interest about the materials" — something about the red capsule, in particular, which, the State has conceded, was not reasonable self-evident in advance, *State's Brief* at 80, and which provided the prosecution with a dramatic crescendo to its closing argument. *See*, 25 T. 3707.

6. Finally, in *Jacobsen*, the white powder was packaged in such a manner as to make it "virtually certain that it contained nothing but contraband." *Slip. Op.* p. 10;[3] in *von Bulow*, the items subjected to laboratory testing were found in ordinary medicine bottles and vials, taken from an area of von Bulow's home — his closet, and indeed "his medicine cabinet", *cf. Slip. Op.* p. 14, n. 28 — in which, as the Trial Judge explicitly found, Mr. von Bulow "had a reasonable expectation of privacy." 4 T. 698-699.

---

[3] Even the dissent acknowledged that it was "essentially inconceivable that a legal substance would be packaged in this manner for transport by a common carrier." *Slip.Op.*, p.26.

For all these reasons, not only is *Jacobsen* distinguishable from the *von Bulow* case; its reasoning, its limiting principle and its holding, all require the conclusion that as a matter of federal constitutional law, the governmental search in *von Bulow* was unlawful.[4]

Federal constitutional considerations aside, the activity here clearly violated R. I. Const. Art. I section 6. In *State v. Benoit,* 417 A.2d 895 (R. I. 1980), this Court construed the Rhode Island Constitution to require stringent adherence to its warrant requirement in searches of automobiles, notwithstanding federal decisions finding such warrantless searches to be "reasonable". *Benoit* rejected the argument that the invasion of privacy inherent in the lawful seizure of an automobile would somehow justify the "lesser" intrusion of a warrantless search of the immobilized vehicle's interior. *Compare, Texas v. White,* 423 U.S. 67 (1975); *Chambers v. Maroney,* 399 U.S. 42 (1970). Instead this Court emphasized that "[o]nly if circumstances render procurement of a warrant impracticable, and if the need of society demand swift action, does Art. I, sec. 6 permit the temporary, limited infringement of an individual's right of privacy." *State v. Benoit, supra.* at 901.

---

[4] The State's argument that "a pill capsule is not among those respositories of personal effects traditionally accorded Fourth Amendment protection" *(State's Brief* at 81) has clearly been rejected by the United States Supreme Court's explicit recognition that medicine cabinets may well contain material deserving of constitutional protection of privacy, since medicine may reveal a great deal about one's health, habits and life style.

This holding is fully applicable here. Indeed the Court used precisely this analysis in *State v. Eisemen,* 461 A.2d 369 (R.I. 1983) which held on facts similar to *Jacobsen* that if a field test for narcotics was a significant expansion of a private search, the further search must fall within one of the recognized exceptions to the warrant requirement. *Id.* 377. *Eiseman* was decided under the Federal Constitution but its limiting principles are not merely appropriate for an analysis under Art. I section 6, but specifically required. *State v. Benoit,* supra at 901. In *von Bulow,* the State did not and could not have made any claim of a need for "swift action" rendering the "procurement of a warrant impracticable". *Id.* at 901. The black bag was held more securely and for a great deal longer than Mr. Benoit's automobile. And the degree of invasion of privacy inherent in the testing of its contents far outweighed the seizure of some clothes and other items from the backseat of the *Benoit* vehicle. The Fourth Amendment aside, Art. I, section 6 condemns what happened here.

Respectfully submitted,

/s/ Alan M. Dershowitz

/s/ John A. MacFadyen

cc: Attorney General

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

Department of Attorney General
72 Pine Street
Providence, Rhode Island 02903
Dennis J. Roberts II, Attorney General

April 12, 1984

Walter J. Kane, Clerk
Supreme Court of Rhode Island
250 Benefit Street

Providence, Rhode Island 02903

RE: *State v. Claus von Bulow*
No. 82-462 C.A.

Dear Mr. Kane:

I am in receipt of a copy of a letter to you from Mr. von Bulow's Counsel dated April 5, 1984. Although this letter does apprise the Court of new authority (*United States v. Jacobsen,* 52 U.S.L.W. 4414), it clearly goes beyond mere advisement and in fact, could more properly be considered a supplementary brief. Since the Appellant has taken the liberty to discuss *Jacobsen* in light of the facts of the *von Bulow* case, the State feels compelled to respond in kind.

United States v. Jacobsen, decided April 2, 1984, presented the question of whether a federal agent must obtain a warrant before conducting a field test on a suspicious substance discovered as a result of a previous private search. In *Jacobsen,* employees of Federal Express examined a package that had been damaged in transit. The container was an ordinary cardboard box. Wrapped in newspapers, inside the box, laid a tube made of silver duct tape. The Federal Express employees cut open the tube and found a large plastic bag containing three smaller plastic bags. Inside the small zip lock bags was about 6½ oz. of white powder. They then notified the DEA and before an agent arrived, the plastic bags were put back in the tube and the tube was back in the box along with the newspapers.

Upon his arrival, the DEA agent removed the tube, the plastic bags and a sample of the contents of each. A field test, conducted immediately, revealed that the substance was cocaine.

The Defendants challenged the warrantless field testing and the Eighth Circuit found that the testing constituted a significant expansion of the previous private search. The United States Supreme Court thought otherwise, holding that the additional intrusion occasioned by the field test did not implicate any legitimate interest in privacy. Id. at 4418.

This case has several significant applications to the *von Bulow* case:

1. Applying the principles enunciated in the majority opinion, it is clear that neither the actions of Mrs. von Bulow's family nor the actions of Sgt. Reise violated the defendant's Fourth Amendment rights. The *Jacobsen* court held that searches conducted by private parties are wholly beyond the reach of the Fourth Amendment. Moreover, they interpreted their prior holding in *Walter v. United States,* 447 U.S. 649 (1980) to encompass circumstances where police agents, in the course of their subsequent investigation, essentially duplicate the search already undertaken by private parties. These principles are fully apposite to the *von Bulow* case, where family members originally discovered Mr. von Bulow's black bag, sent some of its contents to laboratories for testing and later turned over their findings to the Rhode Island State Police.

2. In *Jacobsen,* the motivation for the initial private search was questionable. There was some testimony in-

dicating that it was conducted in accordance with written company policy regarding damaged goods. Id. at 4414. However, a post-trial affidavit indicated that the Federal Express agent opened the package because he was suspicious about its contents. Id. at 4415 n. 10. The Court swiftly pre-empted any attack on the validity of the search based on some insidious motive. They remarked "Whether those invasions were accidental or deliberate and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character." Id. at 4415. Elsewhere in the Court's opinion, Justice Stevens reaffirmed the principle that private searches are beyond the scope of the Fourth Amendment.

> "This Court has also consistently construed this protection as prescribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." Id. at 4415 citing *Walter v. U.S.*, 447 U.S. 649, 662 (1980) (Blackman, J. dissenting)

This basic tenet is particularly relevant to the *von Bulow* case. In *von Bulow*, a private search was undertaken wholly by family members and their agents. The Trial Justice found that this search was conducted without the knowledge or assistance of any governmental agent (Tr. IV 698-699). Thus, the continuing vitality of *Burdeau* was reaffirmed by the *Jacobsen* court and a challenge to any aspect of the family's search based on federal constitutional law is precluded.[1]

---

[1] Although there was a concurring and dissenting opinion in *Jacobsen*, all nine justices agreed that private searches are beyond the scope of the Fourth Amendment. Id. at 4419 (White, concurring), Id. at 4421 (Brennan, dissenting).

3. In *Jacobsen,* all nine justices recognized that the private search doctrine and the plain view doctrine are closely related. Id. at 52 U.S.L.W. 4417; 52 U.S.L.W. 4420 (White, concurring); 52 U.S.L.W. 4423 (Brennan, dissenting). They agreed that where a private party presents the contents of a container to a police officer in such a manner that they are plainly visible, his visual examination of those contents, is not a "search" within the Fourth Amendment. Id. at 4417, 4419-20 (White, concurring), 4421 (Brennan, dissenting). This is precisely what occurred when Alexander brought Mr. von Bulow's black bag to State Police Headquarters on March 13, 1980. The actions of the private parties put the fruits of their search within the plain view of Sgt. Reise. Once these items were placed before him he was able to identify them with "virtual certainty". See: *Jacobsen,* at 52 L.W. 4423. Whatever privacy interest Mr. von Bulow had in its contents had already been compromised by the family's inspection and testing of its contents. (See: State's Brief at 78, 75 n. 84). Alexander brought the black bag to Sgt. Reise for the express purpose of viewing its contents. (See: State's Brief at 77) As in *Jacobsen,* "the agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." Id. at 4417. Thus, the Sargeant's act of inspecting and inventorying the contents of the black bag on March 13th, was not a "search" within the meaning of the Fourth Amendment.

4. Interestingly, all nine Justices agreed that the field test conducted in *Jacobsen* did not violate the Fourth

Amendment. The actions of Sgt. Reise would even meet the test suggested by Justice Brennan in his dissent. See: *Jacobsen,* at 52 U.S.L.W. 4421, 4423 (Brennan, dissenting). Sgt. Reise came upon the contents of the black bags as innocently as the DEA agents did in *Jacobsen.* Under the circumstances of his contact with the contents, he was able to identify their chemical identities with virtual certainty before the test was conducted. See: *State's brief* at 80. Lastly, the tests ordered by Sgt. Reise destroyed only one of each of the various kinds of pills in the vial. (Tr. IV 665)[2] Such intrusion is deminimus and constitutionally reasonable.

5. As in *Jacobsen,* where the Defendants conceded that probable cause existed to believe the package contained contraband, Id. at 4417, n. 20, Sgt. Reise testified that he believed that the pill capsules, powder and blue-green liquid were contraband. (Tr. IV 659, 660, 664, 667). Since the prescription bottle containing the various pills was only for Dalmane, it was entirely reasonable for Sgt. Reise to suspect the others were contraband. As the *Jacobsen* court remarked: ". . . It is well-settled that it is constitutionally reasonable for law enforcement officials to seize "effects" that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband." Id. at

---

[2] The other items sent for testing, the powder and the blue green liquid, had already been tested by the family, so the testing replicated by the State Police did not expand the scope of the private search. *Jacobsen,* 52 U.S.L.W. 4417. Moreover, the test results acquired by the family were available for attack by the defense. Finally, any destruction of evidence was not precipitated by the Government's actions but rather occurred in the laboratory routine. See: State's brief at 76, n.86.

4417. Also see: *Illinois v. Andreas,* 51 U.S.L.W. 5517, 5159 (1983).

6. Contrary to Appellant's suggestion, the need to conduct an "one the spot" field test played *no* part in the Jacobsen court's ultimate conclusion that the field testing did not violate the Fourth Amendment. Rather, the law enforcement interest recognized by the Court was the suspicious nature of the material which made it virtually certain that the powder was contraband. Id. at 52 U.S. L.W. 4418. This interest outweighed the infringement on Jacobsen's possessory interest in the cocaine. Similarly, in *von Bulow,* the legitimate law enforcement interest in verifying the suspicious mixture of pills, powder and liquid outweighed the deminimus intrusion on Mr. von Bulow's possessory interest.

7. In *Jacobsen,* the Court observed that the field test could reveal nothing but the presence of cocaine, which the DEA agent was already "virtually certain" of. In *von Bulow,* the toxicology results only verified the chemical identities of the drug. As Sgt. Reise was already virtually certain of these identities because their plain markings or the previous tests ordered by the family no further invasion of Mr. von Bulow's privacy was committed. See: *State's brief* at 77-79. Although Sgt. Reise was ultimately mistaken about the contents of one red pill capsule, he had suspected that it was contraband and had already identified it as seconal before he sent it to the laboratory. (Tr. IV 663) The ultimate result of the test does not alter the standard for reasonableness, that is, the validity of his original knowledge and motivation. The outcome does not change the analysis. Thus, the

Jacobsen holding applies to the red capsule with the same force as it applies to all other drugs in Mr. von Bulow's bag.

8. Contrary to Appellant's assertions, ***none*** of the drugs tested were found in Mr. von Bulow's medicine cabinet. This suspicious potpourri of needles, powder, pills, liquid, ampoules and syringes was found in his black bag which was secreted in a metal box which had been tucked underneath a shelf in Mr. von Bulow's closet. (Tr. III 324, 419) This most certainly is not the case contemplated by Justice Stevens when he remarked that an agent's arbitrary invasion of a neighbor's sugar bowl or medicine chest would not be tolerated. *Jacobsen,* at 52 U.S.L.W. 4418, n. 28. By the time Sgt. Reise sent these drugs to be tested, there was significant evidence that Mr. von Bulow had engaged in some wrongdoing in which drugs had played an integral role.

Finally, the holding of the United States Supreme Court is perfectly consistent with this Court's holding in *State v. Eiseman,* — R.I. —, 461 A.2d 369 (1983). Ten months before *Jacobsen* was decided, this Court identified the appropriate analysis as one that focused on the scope of the previously conducted private search. *Eiseman* supra at 461 A.2d 376. Application of both *Jacobsen* and *Eiseman* to the case at bar makes inescapable the conclusion that the searches therein involved did not violate the Fourth Amendment. As private searches are clearly beyond the reach of the Fourth Amendment, *Jacobsen,* 52 U.S.L.W. 4415, *Eiseman,* 461 A.2d 374 (1983), the actions of the family in taking Mr. von Bulow's black bag, examining its contents and sending some items for testing are not subject to challenge under the Fourth Amendment.

Similarly, as government actions which do not constitute a significant expansion of the previous private search cannot be considered a separate or illegal search, *Eiseman,* supra at 376, *Jacobsen* supra at 4416, 4417; Sgt. Reise's examination, inspection and testing of items previously treated in that manner by the victim's family did not violate the Fourth Amendment. This narrows the Court's inquiry to the field testing of three pill capsules, 1 tablet and two glass ampoules. *State's brief* at 78, n. 92 (Tr. XVI 2038). As previously noted, the contents of each of these items was plainly visible or reasonably self-evident to both the family and Sgt. Reise. *State's brief* at 80. Moreover, Sgt. Reise thought they were contraband (Tr. 659, 660, 667). Therefore, under *Jacobsen,* the field testing of any of these items, even the red capsule, neither constituted a significant expansion of the private search nor violated the privacy interests protected by the Fourth Amendment. See No. 7, supra. *Jacobsen* supra at 4416, n. 58, 4418.

Since this Court indicated that it would be guided by the principles announced in *Jacobsen,* the State urges that the question left open in *Eiseman* be answered consistently with the *Jacobsen* decision and the field testing in this case be found constitutionally reasonable.

I would appreciate it if you would distribute this letter to the members of the Court along with Mr. MacFayden's letter concerning the *Jacobsen* case.

Respectfully submitted,

/s/ Sharon O'Keefe
Special Assistant Attorney General
Chief—Appellate Division

DENNIS J. ROBERTS, II
ATTORNEY GENERAL

Susan E. McGuirl
Deputy Attorney General

Stephen R. Famiglietti
Special Assistant Attorney General

cc: Alan M. Dershowitz, Esq.
John A. MacFayden, III, Esq.

ITEM	LABEL	INFORMATION REVEALED BY PRIVATE TESTING	INFORMATION REVEALED BY PLAIN VIEW	INFORMATION REVEALED BY STATE CHEMICAL TEST
Black Bag				
Needle		Presence of insulin, amobarbital, diazepam		
Blue-green liquid		Presence of pharmaceutically altered mixture of diazepam and amobarbital		same as private test
Powder		Presence of diazepam, Pharmaceutically altered		same as private test
Orange-yellow capsule	"Dalmane"		Dalmane	Flurazepam (generic component of Dalmane)
Blue tablet	"Roche 10 Valium"		Diazepam (Valium)	same as private test
Clear Ampoule	"Papaveretum"		Papaveretum (Label)	codeine, morphine
Lidocaine glass container	"Lidocaine"		Lidocaine (Label)	same as plain view
Blue capsule	"Lilly F33"		Amytal	same as plain view
Red capsule	"Lilly F40"		Seconal	Secobarbital, amobarbital, cyclizine

BEST AVAILABLE COPY

Office - Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-106.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
PETITIONER,
v.
CLAUS VON BULOW,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

ALAN M. DERSHOWITZ,
232 Brattle Street,
Cambridge, Massachusetts 02138.
(617) 661-1965

JOHN A. MACFADYEN,
The Remington Building,
91 Friendship Street,
Providence, Rhode Island 02903.
(401) 521-4420
Attorneys for Respondent.

Of Counsel:
JEANNE BAKER,
JUDITH H. MIZNER,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663

JOANN CRISPI,
ANDREW CITRON.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

31 pp

Question presented.

Should this Court review a decision of a State Supreme Court reversing a conviction where the State Supreme Court based its decision ordering a new trial on "bona fide, separate, adequate and independent grounds" mandated by its own State Constitution and constituting "an alternative independent foundation upon which we rest our holding," after first concluding that trial errors resulted in a trial which failed "to promote the interests of society or defendant in reaching a fair or accurate resolution of the question of guilt or innocence?"

Table of Contents.

Question presented 1

Statement of case 2

Argument 8

I. The Rhode Island Supreme Court opinion rested on bona fide separate and independent state grounds 8

A. Introduction 8

B. The existence of independent, adequate state grounds to support a state court judgment bars review of that judgment by this court 8

C. Under the proper standard of review, this court must recognize the independent and adequate state ground in this case 9

D. The alleged failure of the lower court to analyze harmless error in its discussion of state law does not vitiate the existence of independent adequate state grounds 13

II. The federal law analysis below is an unremarkable application of well-established Fourth Amendment principles to the particular facts of this case 19

A. The state's only quarrel with the lower court's resolution of the Fourth Amendment claims is a quarrel with its fact findings, not with its interpretation of the law 19

B. The state presents no reason to eliminate the exclusionary rule in this case 22

Conclusion 24

Table of Authorities Cited.

CASES.

Barclay v. Florida, 103 S.Ct. 3418 (1983) 16, 18
Chapman v. California, 386 U.S. 18 (1967) 14n, 16, 17
Connecticut v. Johnson, 103 S.Ct. 969 (1983) 16
Cummings v. Church, 50 R.I. 71 (R.I. 1929) 18
Engle v. Isaac, 456 U.S. 107 (1982) 9n
Fahy v. Connecticut, 375 U.S. 85 (1963) 15n
Fox Film Corporation v. Muller, 296 U.S. 207 (1935) 9
Hankerson v. North Carolina, 432 U.S. 233 (1977) 9n
Herb v. Pitcairn, 324 U.S. 117 (1945) 9, 13n
In re Derek, 448 A.2d 765 (R.I. 1982) 14n
Marley v. Providence Journal Company, 134 A.2d 180 (R.I. 1957) 18
Massachusetts v. Sheppard, No. 82-963 (U.S. July 5, 1984) 23
Massachusetts v. Upton, 104 S.Ct. 2085 (1984) 8
Michigan v. Long, 103 S.Ct. 3469 (1983) 8, 9, 10, 11, 12 et seq.
Minnesota v. National Tea Co., 309 U.S. 551 (1940) 8
Rosner v. United States, Supreme Court 73-1062 24n
Senn v. Kogut, 89 A.D.2d 842 (R.I. 1952) 18
State v. Benoit, 417 A.2d 895 (R.I. 1980) 12, 14n, 15n
State v. Bowden, 473 A.2d 275 (R.I. 1984) 14n
State v. Bower, 109 R.I. 198 (1971) 15n
State v. Burke, 427 A.2d 1302 (R.I. 1981) 14n
State v. Eiseman, 461 A.2d 369 (R.I. 1983) 20
State v. Luther, 116 R.I. 28 (1976) 16
State v. Sitko, 460 A.2d 1 (R.I. 1983) 16n

Terry v. Ohio, 392 U.S. 1 (1968) 10
United States v. Jacobsen, 104 S.Ct. 1652 (1984) 19, 20n, 21n, 22n
United States v. Leon, No. 82-1771 (July 5, 1984) 23

STATUTES.

United States Constitution
Fourth Amendment 2, 3n, 10, 13n, 19
Michigan Constitution
Article I, § 11 10
Rhode Island Constitution
Article 1, § 6 2, 3, 18
Rhode Island Superior Court Rule 16(a) 18
Rhode Island General Laws
§§ 21, 28, 3.29 22n

No. 84-106.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
PETITIONER,

v.

CLAUS VON BULOW,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

Statement of Case.

The petition for certiorari filed by the State of Rhode Island seriously misleads this Court. It proceeds for 21½ pages to discuss this case as if the sole ground for the decision below was the state court's interpretation of the Fourth Amendment to the United States Constitution. Then, when it finally gets around to acknowledging, at page 22, that the Rhode Island State Constitution *also* played a role in the decision below, it characterizes that role as nothing more than a superficial after-thought — as a mere "citation [to] the state constitution," which the state court "noted in addition" to federal authority.

Nothing could be further from the truth. As even a cursory reading of the decision below makes clear, the Rhode Island State Constitution provided a complete and full-fledged *alternative ground* upon which reversal was founded. Indeed, the Rhode Island Supreme Court introduced its discussion of the State Constitution by holding:

> Even were we to hold that defendant's Fourth Amendment rights had not been violated by the State Police's chemical testing, our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained through the state's toxicological examination of the contents of the black bag be suppressed.

(App. 47.)[1] The court below then launched into a careful exigesis of state law which consumed four printed pages (App. 47-51) and which explained in detail why Article 1, § 6 of the Rhode Island Constitution constitutes "'bona fide separate, adequate, and independent grounds,' . . . upon which [the court] base[d] [its] decision to suppress the admission of evidence procured by the state's toxicological analysis" (App. 47). And, as will be discussed *infra* at 8-12, in reaching this conclusion, the court below

---

[1] Respondent uses the following abbreviations throughout: "Pet." for the State's Petition for Writ of Certiorari; "App." for the State's Appendix to Petition for Writ of Certiorari; "(Volume T. (page)" for citations to the record below. In addition, appellate briefs are referred to as "A.B." (Appellant's Brief); "S.B." (State's Brief). "A.R.B." (Appellant's Reply Brief); and "S.R.B." (State's Reply Brief).

engaged in precisely the type of analysis that properly insulates a state court decision from federal review.[2]

Thus, while the State of Rhode Island fails to even address the issue of an independent and adequate state ground until the very end of its petition — and then proceeds to address it misleadingly — the fact is that this issue is dispositive of the petition. For if, contrary to the state's suggestion, the Rhode Island Supreme Court did not merely pay lip service to Art. 1, § 6 of its state constitution but alternatively grounded its decision in that provision, then, complain as the state might, this Court simply has no "jurisdiction to review the federal constitutional errors complained of" (cf. Pet. 23).[3]

Before turning to the argument, a word must be said about the state's simplistic and one-sided rendition of the facts of this case. Since this petition does not raise sufficiency of the evidence issues, it is irresponsible of the state to present only the "facts" favorable to its side. The state studiously omits all reference to the massive amount of record evidence that points to Claus von Bulow's innocence. Since this is not a sufficiency case, respondent will not present its "closing argument" to this Court, as petitioner has. Suffice it to say that virtually every "fact" presented by the state has been challenged by contrary evidence, inferences and argument. This material is part of the voluminous record in this case — nearly 6,000 pages of transcript and 400 pages of briefs — and is available for this Court's perusal. Respondent

---

[2] Petitioner also misleads the Court by never informing it that the Rhode Island Supreme Court found two separate issues "to be dispositive." (App. 11). See *infra* at 6-7.

[3] Lest there be any doubt, respondent will, after first demonstrating, in § I *infra*, why the judgment below is indeed supported by an adequate and independent state law basis, proceed to demonstrate, in § II *infra*, why even if the case had been decided exclusively on federal law grounds, the decision would present no issue worthy of certiorari — why it would be nothing more than an unremarkable application of well-established Fourth Amendment principles to the particular facts of this case, as found by the state court.

submits that a full reading of the record — including the material omitted by petitioner — supports Claus von Bulow's sincere assertion of complete innocence.[4]

---

[4] A few examples should suffice to demonstrate the unfairness of the state's omissions.

The state omits all the evidence tending to prove Martha von Bulow caused her own comas: 1) that nineteen days before her second coma an admittedly self-administered aspirin overdose caused Martha von Bulow to be hospitalized for six days (25T. 3699; 18T. 2411; 8T. 419); 2) that even after being warned not to take aspirin, Martha von Bulow was found with aspirin in her system upon admission to Newport Hospital for her second coma (18T. 2426; 10T. 873); 3) that this behavior was consistent with her persistent refusal to abandon the habits which doctors informed her had resulted in past hospitalizations (18T. 2460, 2410; 20T. 3056, warnings to avoid sugar; 13T. 1359; 15T. 1784; 7T. 102, warnings to avoid alcohol; 18T. 2451-2452; 15T. 1756, 1784, warnings to avoid barbiturates and tranquilizers); 4) the testimony of Dr. Carr, a hospital psychiatrist, that Mrs. von Bulow told him that she was "almost never happy," "frequently bored," sometimes unwilling "to get up in the morning," and said, "I have often wished myself dead." (23T. 126-129); 5) the fact that regardless of who owned the black bag, every member of the household had access to the bag, and "ownership" of the black bag, even if established, did not resolve the question of access (9T. 639; 20T. 3060; 9T. 636-37; 3T. 462; 6T. 1051; A.B. 17-18; A.R.B. 5-7); 6) the fact that the sole item tying Claus von Bulow to the black bag may have, in fact, been mistakenly confused with a similar vial which would have established that Mrs. von Bulow owned the bag (25T. 3709-10; A.B. 12-16); 7) the fact that when Maria allegedly first discovered the Insulin in the black bag, her instantaneous, unrehearsed assumption was that it belonged to Martha von Bulow (9T. 651; 8T. 389); and 8) the fact that the only persons to have access to Martha von Bulow in the crucial period *before* she exhibited symptoms for both the first and second comas were herself and Alexander von Auersperg (6T. 1019-20, 1023-1026, 1072-75).

The state omits all the evidence tending to prove that Claus von Bulow made great efforts to help his wife: 1) that nineteen days before her second coma, Claus von Bulow rushed his wife to the hospital under circumstances indicating only a concern for her well-being (17T. 2393-2395; 25T. 3699); 2) on four out of five occasions on which Martha von Bulow was critically ill during 1979 and 1980, Claus von Bulow was the first to call the doctor (6T. 1094; 8T. 362; 9T. 615; 8T. 342); 3) Claus von Bulow's history of attempting to prevent Mrs. von Bulow's self-destructive tendencies from causing her injury (9T. 530-31; 485-86; 20T. 3061; 17T. 2380-81; 20T. 2922; 18T. 2398-99; 17T. 2382-85; 15T. 1754); and, 4) Claus von Bulow's sacrificing of his job for his wife's well-being (6T. 1018; 1044-45).

The state omits all the evidence which casts doubt on its medical testimony: 1) the conclusions of world leading experts who, when presented with all the

Nor can it fairly be said, as petitioner claims, that the Rhode Island Supreme Court has "confidence in von Bulow's guilt." (Pet. 2.) To the contrary, in resolving another issue in favor of

---

information about Martha von Bulow's first coma, concluded that her condition was caused by a medical problem observable under clinical conditions (18T. 2456, 2495-97, 2501, 2505-06, 2534-35, 2536, 2544-45, 2553-54, 2532-33, 2567, 2409); 2) the fact that the state's medical experts were not properly presented with crucial medical information such as Mrs. von Bulow's alcohol and Inderal consumption (13T. 1359; 18T. 2595; 16T. 1930; 19T. 2722; 12T. 1184; 19T. 2720-23; 18T. 2593-96; 16T. 1930; A.B. 5-6); 3) contrary to the state's theory of injection, the absence of needle marks on Martha von Bulow's body — despite diligent attempts to find them (10T. 856; 11T. 926; 15T. 1769-70); 4) the presence of incrustations on the needle offered at trial indicating that it had never been injected (8T. 245; A.B. 11-12; A.R.B. n.30 at 12-13); 5) the state's concession on appeal that there is "no direct scientific evidence to prove that the needle was injected into Martha von Bulow" (S.B. at 15-16); 6) the fact that valium was found on the needle but not in Martha von Bulow's blood (12T.1176-1182, 17T. 2251); 7) the fact that the hypotheticals upon which the state's expert medical testimony was based were defective (19T. 2720-24, 2734; 19T. 2710-13; 18T. 2656; 10T. 1720-21; A.B. 3-6; A.R.B. 8-12; S.B. 6); and 8) that the high insulin level upon which they relied was only one of four discrepant values, and hence scientifically unreportable (18T. 2662; 25T. 3678-79; 20T. 3016; A.B. 6-8; A.R.B. n.25 at 10).

Finally, the state makes multiple assertions which are flatly contradicted by the record. Its petition is filled with innuendo and ominous "facts" which find no support either in the trial testimony of its own witnesses or in reality. 1) In the state's "scenerio" Mrs. von Bulow became ill only after Mr. von Bulow offered her soup (Pet. 5), whereas, in reality, Mrs. von Bulow began to display symptoms *before* Claus von Bulow offered to bring her the soup which she, in fact, asked him for (6T. 1075). 2) The state invents a "routine check" on Mrs. von Bulow which Mr. von Bulow precluded Maria from making (Pet. 5). However, the record is clear that Maria went to Mrs. von Bulow in the mornings upon Mrs. von Bulow's ringing for her (9T. 522-24). 3) The black bag was spotted in November 1980, not "among Claus von Bulow's things" (Pet. 4), but rather, in a white canvas tote bag used by both Mr. and Mrs. von Bulow containing magazines on a chair out in the open (8T.387, 390; 9T. 625). 4) Claus von Bulow did not "misrepresent" his wife's symptoms (Pet. 3), rather, he accurately described symptoms with which Maria disagreed (8T. 343, 344; A.R.B. 11, n.27). 5) Mr. von Bulow made no attempt to hide his description and conversation from Maria. Thus, she did not "overhear" him (Pet. 3), but rather he made the call openly in her presence (9T. 669). 6) Contrary to the state's claim, the cause of Martha von Bulow's 1979 episode did not "remain a mystery" (Pet. 4), but rather was fully and satisfactorily diagnosed both by the hospital doctors and at a subsequent work-up at Columbia Presbyterian Hospital (15T. 1731-1732; 18T. 2536). The final diagnosis of

respondent — an issue not even mentioned in the petition — the Rhode Island Supreme Court suggested that no "fair or accurate resolution of the question of guilt or innocence" could be made on the record of this case (App. 29). But, petitioner again misleads this Court by failing to inform it that the Rhode Island Supreme Court found *two* issues — not just the search and seizure issue — "to be dispositive" of the appeal.[5] The other issue — which

---

"reactive hypoglycemia with sensitivity to alcohol" was arrived at based on all of the information about her first coma currently available to her doctors and it included a discussion with the patient herself concerning and confirming her alcohol intake prior to the first coma (*see*, A.R.B. 11, n.27). 7) The state's description of the search omits all references to a locksmith and to Richard Kuh (Pet. 6-7). At trial, the locksmith testified that the private investigator after searching the closet for the black bag, proclaimed that it was not there (20T. 3030-31). (For other examples of the state's attempt to downplay the role of Richard Kuh, see *supra* at 3, 6, 7. (*See* also App. 7-33). 8) The state nowhere mentions that on the occasion when Maria allegedly saw the bottle labelled "Insulin," a contemporaneous witness, Alexander von Auersperg, testified that he could not remember seeing Insulin, despite the fact that he stared at the bag for ten minutes (6T. 1055-1056). 9) The state makes the assertion that "[i]f Martha von Bulow were conscious no doubt she would speak volumes about the events of December 21, 1980" (Pet. 20). This assertion is bizarre in light of her silence for a year after what the state alleges was a similar attempt in 1979. Indeed, she remained married to Mr. von Bulow and never accused him of having anything to do with her condition. 10) The state mentions that Alexander "helped" his mother to bed on the night of December 20, 1980 (Pet. 5). In fact, Alexander had to *carry* her to bed at the completion of their conversation (6T. 1080). 11) As if it were a description of information available to the police at the time that they acted, petitioner states as fact that "von Bulow had secreted in a locked closet a suspicious black bag" (Pet. 14). In reality, all the police knew was that Alexander von Auersperg had produced a bag which might have belonged to Claus or Martha von Bulow or to neither (see A.B. 12-23; A.R.B. 6-7).

Respondent could add to this list, but it does not wish to unnecessarily burden this Court, and will merely state that the above list far from exhausts the numerous factual errors contained in the state's 28 page petition.

[5] "The Defendant raises several issues on appeal to this court. We find two of them to be dispositive. These are: (1) whether the trial justice erred in denying defendant access to certain materials in Kuh's possession and (2) whether the trial justice erred by failing to exclude the results of

the Rhode Island Supreme Court discussed first and which consumed 21 pages of its opinion — involved *the exclusion of potentially exculpatory evidence at the behest of the state*. (The state's complaint about "exclusionary" rules thus rings hollow, since it was the *state*, over *defendant's* vigorous objection, which successfully sought to exclude potentially exculpatory evidence.)

In that part of its decision, which the state does not seek to have reviewed, the Rhode Island Supreme Court found dispositive defendant's argument that the trial court's erroneous application of the lawyer-client and work-product privileges had the effect of denying defendant "access to the requested material [and] to block the flow of potentially relevant evidence that may have been vital to his defense" (App. 31). The result was an "injustice" to defendant and a failure "to promote the interests of society or defendant in reaching a fair or accurate resolution of the question of guilt or innocence" (App. 29).

In light of the Rhode Island Supreme Court's resolution of this dispositive issue, it is unfair — and untrue — to say that the Rhode Island Supreme Court had "confidence in von Bulow's guilt." (Pet. 2.) That Court said nothing of the kind, nor could it in light of the substantial evidence before it — both from the trial and the new trial motion — of Claus von Bulow's innocence. All the Rhode Island Supreme Court said was that without considering "the weight of the evidence nor witnesses' credibility," without considering the exculpatory evidence that was improperly excluded, and with the drawing of all reasonable inferences that are consistent with the accused's guilt (A. 51), it is possible to reach a reasonable conclusion that the defendant may have been guilty of count one. Even this conclusion was vigorously disputed by the Chief Justice, who concluded that "his conviction rests, not upon proof beyond a reasonable doubt, but upon speculation and conjecture (App. 58)."[6]

---

tests performed by state officials upon the contents of the black bag without first obtaining a search warrant."

(App. 11). Defendant's other issues were substantial and might well have required reversal as well, had the court reached them. See Appellants' Briefs.

[6]The majority never discussed the sufficiency of the evidence on count two, the count in which the Chief Justice found that the piling of inferences was proper (App. 57).

Argument.

I. The Rhode Island Supreme Court Opinion Rested on Bona Fide Separate and Independent State Grounds.

A. *Introduction.*

Upon reaching, at the very end of its petition, the dispositive jurisdictional question that should have been presented first — whether the judgment of the Rhode Island Supreme Court is supported by an adequate and independent state-law basis — the state distorts the decision below and engages in a sophistic analysis to bolster its contention that this Court has jurisdiction to review what petitioner argues was an erroneous interpretation of federal constitutional law. Respondent submits that an examination of the Rhode Island Supreme Court's decision under the relevant criteria conclusively demonstrates that that decision rested squarely and solidly on an independent and adequate state ground which precludes review by this Court.

B. *The Existence of Independent, Adequate State Grounds to Support a State Court Judgment Bars Review of That Judgment by This Court.*

It is axiomatic that a state may afford its citizens greater protections under state constitutional provisions than this Court has determined must be provided under federal constitutional provisions. Indeed, "'[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitution.'" *Michigan* v. *Long*, 103 S.Ct. 3469, 3476 (1983) (quoting from *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940)). *See also*, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). As Justice Stevens noted in his concurrence in *Massachusetts* v. *Upton*, 104 S.Ct. 2085, 2091 (1984), "[t]he states in our federal system, however, remain the primary guardian of the liberty of the people."[7] Accordingly, under our system of federalism, it remains the task of state courts to define the scope of protections afforded to citizens under

---

[7]Indeed, in *Upton* Justice Stevens emphasized that state courts should not "unnecessarily invite this Court to undertake review of state court judgments" *Upton*, *supra* at 2090.

state constitutional and statutory provisions. If a state court construes a state constitution to afford its state citizens greater protection than that afforded under the federal constitution, the state prosecutorial branch may not properly ask the United States Supreme Court to intrude into that domestic state dispute.

Consonant with these principles, this Court has long held that it cannot reach out to address federal questions raised in a state court decision where an independent and adequate basis for that decision is founded in the state court's interpretation and application of state constitutional and statutory provisions.[8] Reaching out in such circumstances results only in impermissible advisory opinions and denigrates the integrity of the state judiciaries. *See*, e.g., *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corporation* v. *Muller*, 296 U.S. 207 (1935).

C. *Under the Proper Standard of Review, This Court Must Recognize the Independent and Adequate State Ground in This Case.*

In its petition (Pet. 24), the state, quoting selectively from this Court's discussion in *Michigan* v. *Long* concerning the test to be applied in determining whether review of a state court judgment is permissible, contends that under that standard, review here is appropriate. However, examination of the substance of this Court's discussion in *Michigan* v. *Long* demonstrates that the opposite is true. There, this Court, re-emphasizing the independence of state courts and the avoidance of advisory opinions, reviewed the framework previously used for determining whether review of a state court decision is barred by independent adequate state grounds and enunciated the following standard to be applied:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence

---

[8] In the context of addressing the availability of habeas corpus relief for state prisoners, this Court has forthrightly recognized that a state may insulate convictions from further review by applying its own rules. *See, e.g., Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977); *Engle* v. *Isaac*, 456 U.S. 107, 134 n.43 (1982).

> of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion[*] that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Michigan v. *Long, supra,* at 3476.

Applying that standard to the facts before it in *Long*, this Court concluded that review was not barred. The Michigan Supreme Court had referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law. Both of the references to the state constitution were made in passing and were intertwined with the reference to the federal constitution. As described by this Court:

> On the first occasion, the court merely cited in a footnote both the state and federal constitutions . . . On the second occasion, at the conclusion of the opinion, the court stated: 'We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. I, § 11 of the Michigan Constitution.

Michigan v. *Long, supra,* at 3474 n.3

This Court further noted that the Michigan court had based its decision on its understanding of *Terry* v. *Ohio*, 392 U.S. 1 (1968) and other federal cases and had failed to cite a single state case

---

[*] This reference to "judgment or opinion" is significant in light of petitioner's absurd attempt to distinguish between these two terms. *See* footnote 10, *infra*.

to support the holding that the search was unconstitutional. Thus, this Court concluded that:

> The references to the state constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law. . . . [I]t fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law. . . . It appears to us that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.

Michigan v. *Long*, *supra* at 3477-3478 (citations omitted).

Examining the opinion of the Rhode Island Supreme Court in this case under the totality of the standard enunciated in *Michigan* v. *Long*, *supra*, unequivocally demonstrates the existence of an independent adequate state ground supporting the judgment of the court and precluding review by this Court.

Contrary to petitioner's suggestion (Pet. 22), this is not a case in which the lower court merely "cit[ed]" to or "noted" the existence of a state constitutional provision; it is not a case where this Court must guess at the meaning of a passing or cryptic reference to a state constitutional provision, statute or case in an opinion relying essentially on federal law. Compare, e.g., *Michigan* v. *Long*. Rather, the Rhode Island Supreme Court began a separate section of its opinion with the following pronouncement:

> Even were we to hold that defendant's Fourth Amendment rights had not been violated by the State Police's chemical testing, our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained through the state's toxicological examination of the contents of the black bag be suppressed. Article I, sec. 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding that the toxicological testing was an illegal search. That section constitutes "bona fide separate, adequate, and independent grounds," *Michigan* v. *Long*, ____ U.S. ____, 103 S.Ct. 3469, 3476, ____ L.E.2d ____ (1983), upon which we base

> our decision to suppress the admission of evidence procured by the state's toxicological analysis.

(App. 47).

The court then continued for four printed pages to analyze the Rhode Island Constitution and Rhode Island state case law as the basis for its conclusion that the Rhode Island Constitution separately and independently required suppression of the evidence. After explicating its power, as a matter of state law, to impose higher standards on searches and seizures than those required by the federal constitution, the Rhode Island Supreme Court set forth a number of instances where it had done so, explained its decision as consonant with Rhode Island's "early legislative enactment" of the exclusionary rule prior to federal application of the rule to the states, and applied the principles of its decision in *State* v. *Benoit*, 417 A.2d 895 (R.I. 1980), to the facts of this case. Thus, here — again, in sharp contrast to what occurred in *Michigan* v. *Long* — the state court did not reach its conclusion that its state constitution required suppression of critical evidence because it felt compelled to do so by prior federal decisions. Rather, it commenced its analysis with a clear and express statement that even if federal constitutional principles did not require suppression, the separate provisions of the Rhode Island Constitution mandated suppression. It then analyzed the facts under state precedent, and carefully and expressly stated that it was basing its decision on a separate and independent state ground. A state court can be no clearer than was the Rhode Island Supreme Court in this case.[10] To find that the Rhode Island Supreme Court failed in

---

[10] Indeed, at one point in its petition, the state grudgingly — but candidly — concedes "that the *opinion* of the Rhode Island Supreme Court offered an alternative basis for the suppression of evidence in this case" (Pet. 24; emphasis in original). Realizing that this concession would deny this Court jurisdiction to review the case, it attempts to concoct a distinction between the *opinion* of the Rhode Island Supreme Court and its *judgment*. But in light of the reference in *Michigan* v. *Long* to "judgment or opinion," p. 10, *supra*, petitioner's attempt to distinguish between these two terms (see Pet. 24) is absurd. Moreover, the purported distinction ignores the fact that there is, under Rhode Island law, no separate document entitled "judgment." Indeed, as a matter of Rhode Island practice, "the judgment" is the concluding portion of "the opinion" — in this case, section V: "For the reasons stated, the defendant's appeal is sus-

this case to express sufficiently its reliance on grounds other than those it believed compelled by federal law, would mean that no state decision could be found to be based on independent and adequate state grounds. Such a result would violate the legitimate power of the State Supreme Court to decide, with finality, that its own state constitution mandates greater protection for its citizens than that required by the federal constitution.[11]

D. *The Alleged Failure of the Lower Court to Analyze Harmless Error in Its Discussion of State Law does Not Vitiate the Existence of Independent Adequate State Grounds.*

The state concedes that the Rhode Island Supreme Court engaged in a harmless error analysis. But it contends that that court did not specifically cite Rhode Island law nor expressly discuss harmless error in the context of its holding that the Rhode Island Constitution mandates exclusion of the challenged evidence. It

---

tained, the judgment of conviction appealed from is vacated and the case is remanded to the Superior Court for a new trial on both counts." The absurdity of petitioner's argument is demonstrated by hypothesizing a case where a state court first considered *and rejected* a defendant's federal Fourth Amendment argument and then considered and *accepted* defendant's state constitutional argument and reversed with an order like the one in this case. Under the illogic of petitioner's argument, this Court would be precluded from relying on the state court opinion.

[11] Another mode of analysis demonstrating that certiorari is inappropriate here is suggested by *Herb* v. *Pitcairn*, 324 U.S. 117 (1945), another case cited by petitioner (Pet. 24). There, in remanding the case back to the state court for a determination of its ground for decision — a result which *Michigan* v. *Long* suggests is no longer favored — the Court stated:

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. *Pitcairn, supra* at 126. Here, in excising the Rhode Island Supreme Court's analysis of federal law and examining only its discussion of the state constitution and state law, it is plain that the same judgment would have resulted had the court below never mentioned federal law. Thus, even if the petitioner's analysis of federal law is correct — an analysis vigorously disputed by respondent, see § II *infra* — this Court's agreement with that position would, under the facts and circumstances of this case, be nothing more than an advisory opinion.

seeks to argue from this contention — which, as respondent will show, is simply erroneous — that despite its concession "that the opinion of the Rhode Island Supreme Court offered an alternative basis for the suppression of evidence" (Pet. 24), this Court nonetheless has jurisdiction to review this case. It argues that the Rhode Island Supreme Court's alleged failure separately to discuss state harmless error law demonstrates the inadequacy of the state law ground and the dependency of state law on federal law.

There are six dispositive reasons why petitioner's spurious arguments provide no plausible basis for review by this Court.

First, the state's assertion that "[t]he [lower] court neither analyzed nor concluded that the state constitutional error was harmful" (Pet. 26) is simply inaccurate.

Prior to embarking on both its federal Fourth Amendment and its state constitutional analysis of the "state expansion of private search" issue, the Rhode Island Supreme Court expressly addressed the prosecution's harmless error claims. It examined the admission of the challenged evidence *both* under the federal standard ("harmless beyond a reasonable doubt")[12] *and* under the Rhode Island standard ("a reasonable possibility that defendant would be convicted").[13] It found first that "even cursory review of the record precludes . . . a finding, [that the error was harmless beyond a reasonable doubt]". It pointed to the absence of any "direct evidence to connect defendant with the two alleged murder attempts upon his wife," noting that the "State's entire case is predicated upon circumstantial evidence"[14] (App. 35). It then concluded that "at a minimum," the introduction of the evidence at issue "created a reasonable possibility that defendant would be convicted." (App. 37).

---

[12] See *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967).

[13] See *State* v. *Burke*, 427 A.2d 1302, 1304 (R.I. 1981); *State* v. *Bowden*, 473 A.2d 275, 280 (R.I. 1984); *State* v. *Benoit*, 417 A.2d 895, 901 (R.I. 1980). The exact language used in *Benoit* is "reasonably possible that such evidence would influence an average jury on the ultimate issue of guilt or innocence." *Id.* at 901.

[14] A state is, of course, entitled to take a more skeptical view of cases based entirely on circumstantial inferences than do the federal courts. Rhode Island does, in fact, have a far more demanding test for convictions based on multiple circumstantial inferences. See *In re Derek*, 448 A.2d 765 (R.I. 1982). A state may also take this skeptical view of cases based on multiple inferences into account in applying its harmless error rule.

Having fully responded to the harmless error claims made by the prosecution, the Rhode Island Supreme Court then turned to its Fourth Amendment analysis and then to its state constitutional analysis which petitioner concedes was "an alternative basis for the suppression of evidence in this case." (Pet. at 24.)

How petitioner can now argue that "the court never concluded that the state constitution required reversal of von Bulow's conviction" (Pet. 25-26) defies understanding. Its criticism, at best, is of the formal structure of the court's opinion. It would have preferred the Rhode Island Supreme Court to have separately addressed the federal and state harmless error rule in different parts of its opinion. This is especially mystifying in light of petitioner's contention that this Court "is empowered to review judgments, not opinions." The state prosecution is surely not empowered to ask this Court to reorganize the paragraphs of a state court opinion in accordance with the prosecutor's preferences.

Second, the harmless error issue raised by petitioner does not involve resolution of a question of law, state *or* federal. It involves a practical evaluation of the evidence in a particular case — a factual weighing of the impact of particular error on the jury — which, contrary to petitioner's contention, does *not* involve determination of constitutional issues, under either Rhode Island law[15] or federal law.[16]

Third, it is clear that a state court's determination of whether, how and when a particular state standard of review need be applied is a question of state law that is insulated from review by this Court. See pp. 9-10. Whether a state court correctly or

---

[15] As the Rhode Island Supreme Court stated in *State* v. *Benoit*, 417 A.2d 895, 901 (R.I. 1980), in making its determination of harmless error the court will "examine the 'record with a view to determining what in our judgment would have been the probable impact of the improper evidence on the minds of the jury.'" (Quoting from *State* v. *Bower*, 109 R.I. 198 (1971).)

[16] As Justice Harlan noted in his dissent to *Fahy* v. *Connecticut*, 375 U.S. 85, 92 (1963), harmless error determinations are "evidentiary questions" which "are not a proper part of this Court's business." Disputes regarding harmless error require review of the record, and "[t]he most that can be said is that the record leaves the issue of harmless error open to differing conclusions. That, however, furnishes no ground for this Court's intervention. . ." *Id.* at 92.

completely applies its own law surely raises no issue of federal law.[17] See *Connecticut* v. *Johnson*, 103 S.Ct. 969 (1983); *Barclay* v. *Florida*, 103 S.Ct. 3418 (1983).

Fourth, petitioner takes the position that the Rhode Island harmless error rule is not the same as the federal rule and is not derived from it: "[I]n analyzing state constitutional issues, the Rhode Island Court eschews the *Chapman* 'beyond reasonable doubt' standard in favor of a more relaxed standard" (Pet. 26).[18] Yet if

---

[17] Indeed, there is no authority for the proposition that a state must — as a matter of federal constitutional law — have *any* harmless error rule. A state is entirely free — if it chose to — to have a rule of automatic reversal if certain state constitutional provisions are violated. *Connecticut* v. *Johnson*, *supra*, at 974 n.9. Justice Stevens, concurring in *Connecticut* v. *Johnson*, 103 S.Ct. 969, 978 (1983) noted the important differences between three kinds of harmless error rules: 1) when federal constitutional error has been committed; 2) when federal nonconstitutional error has been committed; and 3) "a state's own harmless error rule applicable to errors of state law." Justice Stevens then commented that *Connecticut's* claim that a state Supreme Court "must make a harmless error examination everytime the prosecutor asks it to" is "so clearly erroneous that it does not merit the court's review by writ of certiorari." *Id.* at notes 2 and 3. That case involved the giving of a *Sandstrom* instruction — an issue based on federal constitutional law. In this case, involving a violation of the state constitution, it follows *a fortiori* that the prosecutor's claim concerning a state harmless error examination does not warrant Supreme Court review.

It should also be noted in this context that it is not unusual in Rhode Island practice, when the court makes findings that significant evidence was improperly admitted, to proceed to order reversal without engaging in *any* explicit harmless error analysis at all. In *State* v. *Sitko*, 460 A.2d 1 (R.I. 1983) for instance, the court found that "much of the evidence presented against the defendant" resulted from a search based on an improper state wiretap. In granting the defendant's motion to suppress, the court simply declared the judgment vacated and the case remanded, without making any findings as to harm or prejudice. *Id.* at 6. See also, *State* v. *Luther*, 116 R.I. 28 (1976).

Similarly, in this case, where the lower court found that the disputed evidence "formed a significant part of the state's case" (A. 35), the court was free, under Rhode Island practice, to order reversal without a separate discussion of harm. For this reason alone, the omission of a state law harmless error discussion — or indeed, any harmless error discussion — can raise no question within this Court's jurisdiction.

Here, of course, there can be no question that the lower court's harmless error analysis was indeed a sufficient one.

[18] It is not clear what petitioner means by "more relaxed." As discussed above, in its opinion in the instant case, the Rhode Island Supreme Court first found that the evidence was not harmless under the *Chapman* standard: it then

it is true that the state eschews the federal constitutional standard in evaluating state constitutional errors (as the petitioner contends) and if the result is favorable to the defendant (as is the case here) then it is beyond dispute that the "application of a state harmless rule is, of course, a state question where it involves only [alleged] errors of state procedure or state law." *Chapman* v. *California*, 386 U.S. 18, 21 (1967). And the State Supreme Court is the highest authority on such state questions.[19]

Fifth, even if the state harmless error rule is substantially similar to the federal rule — which petitioner disputes — it simply does not follow that the state analysis is dependent on federal law. See *Michigan* v. *Long*, *supra* at 103 S.Ct. 3476. Each may be — and indeed is — independent of the other. Indeed, the state of Rhode Island began to evolve its own independent harmless error standard even before the Supreme Court decided on the

---

went on to find that "*at a minimum*," it created a reasonable possibility that defendant would be convicted." (App. 37.) -- quoting the *Burke* standard (see p. 14, n.13 *supra*).

[19] Nor does it matter whether the state standard is more favorable to the prosecution, more favorable to the accused, or substantially similar. In any case, it is purely a question of state law.

If the state standard is more favorable to the prosecution, then any alleged failure of the state court to apply that standard does not raise a federal constitutional issue. Petitioner's remedy, if any, was before the State Supreme Court. As discussed *infra*, it should have — but did not — make this afterthought argument in its petition for reargument. If the state standard is more favorable to the defendant, then the state surely has no standing to complain to the court. For if the state court found harmless error under a standard more favorable to the state, it would necessarily find harmless error under a standard more favorable to the defendant. If the Rhode Island standard is substantially similar to the federal standard — which petitioner disputes — then there would be no reason for the Rhode Island Supreme Court to make separate harmless error evaluations under each standard. Moreover, as previously argued, this Court would then be presented with no broad issue involving the proper standard to be applied. Instead the issue would simply be whether under the particular facts of the case an admittedly proper state standard has been correctly applied. This is surely a mundane and particular issue of state law application, not properly subject to review by this Court.

Nor should this Court seek to resolve the issue raised by the state: namely whether the current Rhode Island standard is "more relaxed," less relaxed, or substantially similar to the *Chapman* standard. The extent, if any, to which that issue may be in flux within the Rhode Island judiciary is simply not a federal concern. The courts of Rhode Island are fully capable of resolving it, if indeed, it requires any resolution.

proper federal standard for federal constitutional errors. *See Senn* v. *Kogut*, 89 A.D.2d 842, 844-845 (R.I. 1952) (detailing Rhode Island's long statutory and common law harmless error doctrine); *Marley* v. *Providence Journal Company*, 134 A.2d 180, 184 (R.I. 1957); *Cummings* v. *Church*, 50 R.I. 71 (R.I. 1929).

Sixth, petitioner waived the argument it is now seeking to have this Court review by bypassing the state remedy available to correct the alleged error of state law of which it now complains. It never asked the Rhode Island Supreme Court to make an entirely separate examination of harmless error under the Rhode Island cases. In its initial appellate brief, it never argued that there was any distinction between the state and federal harmless error standards. Its reply brief was also silent on this issue. And in its lengthy petition for reargument — filed *after* the decision which it is now seeking to have this Court review — it never once suggested that the Rhode Island Supreme Court should separately examine the admission of the challenged evidence under the federal and state harmless error rules. By thus bypassing the appropriate state vehicle for raising this issue, petitioner waived its current argument under Rhode Island law and practice. *See*, R.I. Sup. Ct. R. 16(a).

The petitioner's current argument is a classic post-appellate afterthought of this sort which this Court has repeatedly refused to consider. See *Barclay* v. *Florida*, 103 S.Ct. 3418, 3425 n.9.

Thus, there is neither any gap nor inadequacy in the Rhode Island Supreme Court's applications of the harmless error standard. That Court found the admission of the challenged evidence to be constitutional error under Article I, § 6, of the Rhode Island Constitution after fully considering and rejecting the prosecution's harmless error arguments. It applied its own harmless error rule in a manner consistent with Rhode Island state law and practice. Petitioner had every opportunity to challenge any alleged failure of the Rhode Island Supreme Court to be more specific in its petition for reargument, but petitioner failed to do so. That should be the end of the matter.

II. The Federal Law Analysis Below Is an Unremarkable Application of Well-Established Fourth Amendment Principles to the Particular Facts of This Case.

Even if this Court could properly reach petitioner's federal law claim — which it cannot — this Court would find no valid basis for granting *certiorari* in this case. For although the state *asserts* that the court below "decided important matters of federal law in a manner contrary to cases decided by this Court, and in conflict with the decisions of the highest courts of other states and decisions of federal courts of appeals" (Pet. 2, see also Pet. 12), the fact is that the court below did no such thing. Indeed, an examination of the decision of the Rhode Island Supreme Court reveals that it made *no* decisions contrary to the decisions of this Court; it expounded no new standards to govern the application of federal law; rather, in the alternative part of the decision based on federal law it took the standards and principles of federal law that it found in decisions of this Court and properly applied those standards and principles to the facts of this case.

A. *The State's Only Quarrel with the Lower Court's Resolution of the Fourth Amendment Claims Is a Quarrel With Its Fact Findings, Not with Its Interpretation of the Law.*

The central thrust of petitioner's Fourth Amendment argument is a claim that the Rhode Island Supreme Court incorrectly interpreted this Court's decision in *United States* v. *Jacobsen*, 104 S.Ct. 1652 (1984). Indeed, petitioner accuses the Rhode Island Supreme Court of "eschew[ing] *Jacobsen's* principles in favor of von Bulow's original expectation of privacy in his locked closet" (Pet. 12), of "zeal[ously] . . . avoid[ing] the mandate of *Jacobsen*" (*id.*), and, ultimately, of "rejecting *Jacobsen*" (Pet. 13). Specifically, petitioner argues that whereas *Jacobsen* "held that in measuring the reasonableness of police conduct, a court must view the facts as they existed at the time an official invasion occurred" (Pet. 10), "the Rhode Island Supreme Court ignored the objective reasonableness of the [state toxicological] test[ing] at its inception." (Pet. 13).

Petitioner's argument completely overlooks the fact that the Rhode Island Supreme Court explicitly *discussed, accepted* and *applied* the principles and mandate of *Jacobsen* (see App. 38-43,

46, 47) — going so far as to acknowledge that in light of *Jacobsen* its own earlier decision in *State* v. *Eiseman*, 461 A.2d 369 (R.I. 1983) "would have been quite different" (App. 39).[20] The problem with petitioner's argument is, even more fundamentally, that it is based on a characterization of the *facts* "at the inception" of the official invasion that is *wholly at odds* with the facts as found by the Rhode Island Supreme Court.

Thus, in petitioner's version of the facts, "[b]efore Sgt. Reise ordered any state toxicological test, each and every item related to the black bag had already been identified . . . [and] [m]oreover, Reise knew that in the form they were possessed, some of the items sent for testing were contraband . . ." (Pet. 8-9, see Pet. 10-11, 14). But in the facts *as found by the Rhode Island Supreme Court* — found after consideration of essentially the same factual argument presented now by the state,[21] and after the court's own "full reading of [Sgt. Reise's] testimony" (see App. at 44) — there was *no* certainty of identification prior to the toxicological tests and Reise harbored only a vague, subjective suspicion that the items were "contraband". The decision reads in relevant part:

> Despite his expertise, Lieutenant Reise was unable to identify with a reasonable degree of certainty those substances that he had received from Alex without further test-

---

[20] Petitioner's suggestion that because *Jacobsen* was decided after the oral argument in this case, the court below "was without the benefit" of "the careful discussion" of that decision that "normally occurs in appellate briefs and arguments" (Pet. 12 n.7) is disingenuous. When *Jacobsen* was decided, both parties submitted letters exclusively devoted to discussing that decision, and these letters, far from being "cursory" (*Id.*), provided the court below with unusually extensive discussion of the principles of *Jacobsen* and of the bearing of those principles on this case. Indeed, the text of the parties' *Jacobsen* letters consumed *fourteen printed pages* (eight by petitioner, six by respondent) — more than half the length of the state's petition for *certiorari* now before this Court.

[21] With one difference discussed *infra* at notes 25 and 26, the state previously argued for the same fact findings of "virtual certainty of identification" and of a "reasonable belief in contraband" in its briefs on appeal, in its oral argument and in its *Jacobsen* letter — as a review of the latter, replete with its citations to the state's brief, confirms. *See*, e.g. App. 81-82, ¶ 4, citing state's brief at 80; (App. 82, ¶ 5; App. 83, ¶ 7, citing State's brief at 77-79; App. 85, citing state's brief at 80).

> ing. His testimony is replete with admissions that he sent samples to the state lab because he simply did not know what they were. In spontaneous response to two questions posed by the prosecutor upon direct examination, Lieutenant Reise gave virtually identical answers to explain why he ordered the testing: "I had no idea what it was" (papaveretum); I sent it "[f]or the same reason I just didn't know what it was" (lidocaine). And on subsequent cross-examination, Lieutenant Reise reaffirmed the fact that he ordered the chemical analysis of certain substances precisely because he lacked knowledge of their identity. He stated that the reason he had had the state lab perform the testing was because there were "some unknowns in there that I couldn't identify just through a Physicians Desk Reference." Although he did testify that he felt certain substances delivered by Alex were "a contraband substance or something of that nature," a full reading of his testimony convinces us that these statements were nothing more than an expression of his own vague, subjective suspicions about their identity. These statements clearly do not support a finding that Lieutenant Reise was able to identify the substances delivered by Alex with any reasonable degree of certainty without the aid of the state toxicological tests.

(App. 44.)

Under these facts, it is clear that the Rhode Island Supreme Court did not "ignore[ ] the objective reasonableness of the [state toxicological] test[ing] at its inception," as the state argues (see Pet. 13); on the contrary, the Rhode Island Supreme Court focussed on precisely that question.[22]

---

[22] Nor is petitioner correct in suggesting that in conducting its Fourth Amendment analysis the Rhode Island Supreme Court "fastened upon the subjective test results that showed that one red capsule's chemical identification did not conform to Sgt. Reise's plain view identification" (Pet. 13). To be sure, the Rhode Island Supreme Court did "fasten upon" the results of that test in its discussion of why the error could not be deemed harmless. See App. 34-37 and discussion *supra*. However, in applying the principles of *Jacobsen*, the Rhode Island Supreme Court made only one passing reference to the fact that one of the pills "could not have been purchased with a doctor's prescription in a pharmacy in the condition in which it was found" (App. 42), and that refer-

Having met with defeat on its factual argument in the decision below and on rehearing,[23] the state seeks another bite at the apple[24] in this Court — a chance to persuade this higher court that its own state supreme court "*misperceived the facts . . .*" of this case. (See Pet. 13-14; emphasis added). In short, the state's quarrel is not with the law as interpreted by the Rhode Island Supreme Court; it is with the facts as found by that court. And obviously *certiorari* does not lie to resolve such a quarrel.[25]

B. *The State Presents No Reason To Eliminate the Exclusionary Rule in This Case.*

Petitioner attempts to bolster its case for *certiorari* by arguing that "the principles endorsed" in this Court's recent decisions in

---

ence was made in the context of emphasizing that, at the inception, "*most*, if not all, of the substances tested . . . were found in standard medicine bottles and vials . . . [and] not . . . in such a condition . . . as would make it a virtual certainty 'that [they] contained nothing but contraband.'" (App. 42, citing *Jacobsen* at 4417; emphasis added).

[23] In its Petition to Reargue, the state again tried to persuade the Rhode Island Supreme Court that the evidence "show[ed] that [Sgt. Reise] was virtually certain of the contents of the pill capsules, ampules and tablet before they were verified by the toxicology lab" (App. 59, see also App. 63) and that he reasonably belie[ved] that the items sent for testing were contraband" (App. 61). The state also cited in its Petition to Reargue to R.I. G.L., §§ 21-28, 3.29 for support of its "contraband" claim (compare App. 61 with Pet. 9). But after "carefully consider[ing]" all of the state's arguments, see Order on Petition to Reargue (App. 68), the Rhode Island Supreme Court was not persuaded. (Contrary to the state's suggestion, (Pet. 14 n.8), the fact that the Rhode Island Supreme Court did correct a specific factual error in its Order on the Petition to Reargue does not weaken, but rather strengthens, the state court's assurance that it "carefully considered" all of the state's arguments (App. 68).)

[24] The one change in the factual argument the state presents to this Court is that now, rather than argue that Reise himself "was virtually certain of the contents. . ." the state argues merely that the contents "had *already been* identified — not that Reise *knew* of their previous identification. (See Pet. 8-9, 10-11, 14).

[25] The inappropriateness of *certiorari* in this case is even more dramatic when the one change in the factual argument the state now presents to this Court is taken into account. For under the state's current version of the facts, the searching officer, Reise, *did not know* the results of any previous identifications (see Pet. 8-9, 10-11, 14) — in contrast to the situation in *Jacobsen*, upon which the state seeks to rely, where the searching officer was not similarly lacking in knowledge. See *Jacobsen*, *supra*, at 1659, 1660, 1661.

Massachusetts v. *Sheppard*, No. 82-963 (U.S. July 5, 1984) and *United States* v. *Leon*, No. 82-1771 (July 5, 1984) "suggest that the application of the exclusionary rule in this case is inappropriate" (Pet. 15). But the state cannot ride coattails on *Sheppard* and *Leon*, for those cases involved searches conducted *pursuant to warrants* where the officer's good faith was found by the lower court.[26] As the court in *Leon* emphasized

> The good-faith exception for searches conducted pursuant to warrants is *not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment*, and we do not believe that it will have this effect.

(Emphasis added.)[27]

---

[26] Indeed, the Rhode Island Supreme Court made findings of fact incompatible with the kind of good faith found in *Leon*.

[27] Nor does the state's prediction (see Pet. 18-19) that a retrial could result in a re-conviction provide a reason to eliminate the exclusionary rule in this case. For just as the existence of a Fourth Amendment violation cannot be "dependent upon the results" of the search (see Pet. 13), so too the application of the exclusionary remedy cannot depend upon the outcome at a new trial. In any event, the state can only speculate as to what would occur at a retrial in this case — and the speculation it advances (Pet. 18-19) fails to take into account respondent's substantial new trial motion presently pending before the state courts. Since petitioner has engaged in the prediction that the "evidence regarding an insulin encrusted needle will therefore reach the jury at a second trial" (Pet. 18), it is incumbent upon respondent to correct that misstatement. In its appellate brief, petitioner conceded that the alleged "murder weapon" was "never tied into Mrs. von Bulow" and that there is "no direct scientific evidence to prove that this needle was injected into Martha von Bulow" (S.B. at 15-16). In his new trial motion, respondent offers evidence that this needle — the alleged "murder weapon" — could not have been injected into Martha von Bulow. There is grave doubt therefore, whether the needle "will . . . reach the jury at a second trial." There is also grave doubt whether a jury, hearing the evidence that was erroneously excluded as well as the new evidence of innocence, will again convict. Nor is it appropriate for petitioner to speculate as to the contents of Mr. von Bulow's testimony at a new trial (Pet. 19). In light of the new evidentiary developments since the first trial, it is as impossible as it is irrelevant for the state to speculate accurately as to the evidence or result of any new trial.

Conclusion.

The Rhode Island Supreme Court's decision according Claus von Bulow a new trial at which an "accurate resolution of the question of guilt or innocence will be possible", was based on independent state grounds, was correct as a matter of fact and law, and should be deemed final under principles of federalism, constitutional restraint, and fairness. Accordingly, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

ALAN M. DERSHOWITZ,
232 Brattle Street,
Cambridge, Massachusetts 02138.
(617) 661-1965

JOHN A. MACFADYEN,
The Remington Building,
91 Friendship Street,
Providence, Rhode Island 02903.
(401) 521-4420
Attorneys for Respondent.

Of Counsel:

JEANNE BAKER,
JUDITH H. MIZNER,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663

JOANN CRISPI,
ANDREW CITRON.

For the convenience of the Court, all of the briefs below as well as the new trial motion and supporting affidavits have been sent to the Clerk's Office. See e.g. Supplemental Memorandum of the United States in *Rosner* v. *United States*, Supreme Court 73-1062.

The significance of the newly discovered evidence is vividly demonstrated by a chart appended to the new trial motion, which juxtaposes the new evidence with the state's claims at trial.

MOTION FILED

AUG 20 1984

No. 84-106

Office-Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF RHODE ISLAND,

Petitioner,

v.

CLAUS von BÜLOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF RHODE ISLAND

BRIEF AMICI CURIAE OF THE STATES OF ARIZONA AND CONNECTICUT, AND MOTION TO JOIN BRIEF BY AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE VICTIMS ASSISTANCE LEGAL ORGANIZATION, INC., AS AMICI CURIAE IN SUPPORT OF REVERSAL

HON. ROBERT K. CORBIN, ESQ.
Attorney General
STEVEN J. TWIST, ESQ.
Chief Assistant
State of Arizona
1275 W. Washington Street
Phoenix, AZ 85007

AUSTIN J. McGUIGAN, ESQ.
Chief State's Attorney
State of Connecticut
100 South Turnpike Road
Wallingford, CT 06492

JAMES P. MANAK, ESQ.
Attorney at Law
33 N. LaSalle Street
Suite 2108
Chicago, IL 60602
Tel: (312) 236-3927
Counsel for Amici Curiae.

(Additional counsel listed on inside cover).

BEST AVAILABLE COPY

Pandick Midwest, Inc., Chicago • 454-7600

FRED E. INBAU, ESQ.
JOHN HENRY WIGMORE
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, IL 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Dr. #209
South San Francisco, CA
94080

WILLIAM C. SUMMERS, ESQ.
International Association
of Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, MD 20878

FRANK G. CARRINGTON, ESQ.
Executive Director
Victims' Assistance
Legal Organization, Inc.
210 Laskin Rd., Suite 4
Virginia Beach, VA 23451

JAMES P. MANAK, ESQ.
Attorney at Law
33 N. LaSalle Street
Suite 2108
Chicago, IL 60602
Tel: (312) 236-3927
Counsel for Movants.

Of Counsel:
DANIEL B. HALES, ESQ.
PETERSON, ROSS, SCHLOERB
& SEIDEL
Chicago, Illinois 60601
RICHARD J. BRZECZEK, ESQ.
LEVY & ERENS
Chicago, Illinois 60604

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Statement of Amici Curiae iv

Motion for Leave to Join Brief as Amici Curiae v

Interest of Amici Curiae and Movants vii

Argument 1

THE RULING BELOW REGRESSES FROM THE CURRENT TREND AT ALL LEVELS OF SOCIETY TO RECOGNIZE AND ENHANCE THE RIGHTS OF CRIME VICTIMS.

Conclusion 8

TABLE OF AUTHORITIES

Cases

PAGE

Bradley Center, Inc. v. *Wessner*, 296 S. E. 2d 693 (Ga. 1982) 1

Colorado v. *Nunez*, ____ U. S. ____, 104 S. Ct. 1257 (1984) 5, 6

Michigan v. *Long*, ____ U. S. ____, 103 S. Ct. 3469 (1983) 5

Morris v. *Slappy*, ____ U. S. ____, 103 S. Ct. 1610 (1983) 2, 4

Ohio v. *Johnson*, ____ U. S. ____, 104 S. Ct. 2536 (1984) 6

Oliver v. *United States*, ____ U. S. ____, 104 S. Ct. 1735, (1984) 6

Oregon v. *Haas*, 420 U. S. 714 (1975) 6

People v. *Nunez*, 658 P. 2d 879 (Colo. 1983) 6

Snyder v. *Massachusetts*, 291 U. S. 97 (1934) vii

South Dakota v. *Opperman*, 428 U. S. 364 (1976) .. 6

State v. *Eiseman*, ____ R. I. ____, 461 A. 2d 369 (R. I. 1983) 3

State v. *von Bulow*, ____ R. I. ____, 475 A. 2d 995 (R. I. 1984) 2

United States v. *Jacobsen*, ____ U.S. ____, 104 S. Ct. 1652 (1984) ..... vii, 3

Williams v. *Georgia*, 349 U. S. 375 (1955) 6

Articles and Reports

PAGE

Carrington and Nicholson, "The Victims' Rights Movement: An Idea Whose Time Has Come," 11 Pepperdine L. Rev. 1 (1984) 1

"Crime Victims Rights, a Legislative Analysis," National Organization for Victim Assistance, Inc. (NOVA), Washington, D.C. (1984) 1

Erickson, "Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1983-1984," The Prosecutor, Summer, 1984, p. ____ 5

"Final Report, President's Task Force on Victims of Crime," United States Department of Justice, Washington, D. C. 20531, (December, 1982) 1

Statute

"The Omnibus Victim/Witness Protection Act of 1982," Pub. L. No. 97-291, 96 Stat. 1242 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF RHODE ISLAND,

Petitioner,

v.

CLAUS von BÜLOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

STATEMENT OF THE STATES OF ARIZONA AND CONNECTICUT

The States of Arizona and Connecticut appear as *amici curiae* pursuant to Rule 36, Par. 4, which brief is sponsored by the Hon. Robert Corbin, Attorney General for the State of Arizona, and by Austin J. McGuigan, Chief State's Attorney and chief law enforcement official for the State of Connecticut: the Connecticut Attorney General does not exercise criminal jurisdiction.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF RHODE ISLAND,

Petitioner,

v.

CLAUS von BÜLOW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

MOTION FOR LEAVE TO JOIN BRIEF AS AMICI CURIAE

Additional parties respectfully seek leave of this Court to join the brief as *co-amici*. These parties are **AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.**, the **INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.**, and the **VICTIMS ASSISTANCE LEGAL ORGANIZATION, INC.**

Movants have received the consent of the Petitioner to join this brief (see letter of Dennis J. Roberts, II, Attorney General for the State of Rhode Island, as filed with the Clerk). The attorney for the Respondent, Alan Dershowitz, Esq., has not responded to Movants' request for consent to join this brief.

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-seven times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

THE VICTIMS ASSISTANCE LEGAL ORGANIZATION, INC. (VALOR) of Virginia Beach, Virginia, is a national not-for-profit organization. **VALOR** serves as a clearinghouse of information for attorneys who represent the legal rights of crime victims, and for other victim advocates. Frank G. Carrington, Esq., the founder and executive director of **VALOR** is the Immediate Past Chairperson of the Victims' Committee of the American Bar Association's Criminal Justice Section and served as a Member of the President's Task Force on Victims of Crime (1982).

INTEREST OF AMICI AND MOVANTS

Amici and Movants support the State of Rhode Island in its argument before this Court that the police conduct in this case did not go beyond the private search upheld in *United States* v. *Jacobsen,* ____ U.S. ____, 104 S. Ct. 1652 (1984).

We also support the argument of the State that the "search" conducted by the State Police, in any case, falls within the newly declared *good faith exception* to the exclusionary rule.

However, we wish to focus the Court's attention upon a crucial issue that has not been addressed by the parties, but which, we respectfully submit, should be considered by the Court. That issue is whether the Supreme Court of Rhode Island should apply its unique version of the law of search and seizure, and in so doing, ignore the rights of crime victims.

Long ago, Mr. Justice Cardozo in *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934) noted that, "Justice, though due to the accused, is due to the accuser also . . ." We submit that the passage of fifty years has not dulled the import of those words. If anything, the message of those words should ring in our Halls of Justice with renewed vigor in 1984.

The above named parties respectfully move the Court for leave to join the attached brief as additional *amici curiae.*

JAMES P. MANAK, ESQ.
33 North LaSalle Street
Suite 2108
Chicago, IL 60602
Counsel for Movant Parties

ARGUMENT

THE RULING BELOW REGRESSES FROM THE CURRENT TREND AT ALL LEVELS OF SOCIETY TO RECOGNIZE AND ENHANCE THE RIGHTS OF CRIME VICTIMS.

One of the more encouraging aspects of our evolving criminal justice system has been the current trend towards recognizing and enhancing the rights of crime victims.[1] This has been demonstrated at the legislative,[2] executive,[3] and judicial[4] levels of government, as well as in the private sector.[5] Indeed,

---

[1] *See, e.g.:* Carrington and Nicholson, "The Victims' Rights Movement: An Idea Whose Time Has Come," 11 Pepperdine L. Rev. 1 (1984).

[2] *See, e.g.:* The Omnibus Victim/Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242, in which a number of specific rights of victims have been mandated by the Congress of the United States. *See also:* "Crime Victims Rights, a Legislative Analysis," published by the National Organization for Victim Assistance, Inc. (NOVA), Washington, D. C. (1984), a compendium of all state laws regarding compensation of and restitution to, crime victims together with other legislative enactments enhancing victims' rights.

[3] Every year since 1981 the President of the United States has proclaimed a designated week in April as "Victims Rights Week"; and, significantly, the Governors of most, if not all, states have followed this practice. Additionally, for the first time in the history of criminal justice, a national, Presidential-level Task Force was appointed by President Reagan in 1982, charged specifically with studying means to alleviate the plight of crime victims on the national, state and local levels. *See:* "Final Report, President's Task Force on Victims of Crime," United States Department of Justice, Washington, D.C. 20531 (December, 1982).

[4] *See, e.g., Bradley Center, Inc.* v. *Wessner,* 296 S.E. 2d 693 (Ga. 1982) (Criminal act of mental patient was forseeable and death was proximately caused by private hospital's negligence in issuing an unrestricted week end pass).

[5] The American Bar Association has created a Committee on Victims in its Criminal Justice Section which has taken a number of initiatives on behalf of crime victims by the organized legal profession.

this Court in *Morris* v. *Slappy*, ____ U. S. ____, 103 S.Ct. 1610 (1983), held that the U. S. Court of Appeals for the Ninth Circuit erred in reversing the rape and sodomy convictions of a defendant who had claimed that his Sixth Amendment right to counsel was violated when the trial court refused to grant a continuance while a particular Public Defender who the defendant wanted to represent him recovered from surgery, because an equally competent Public Defender had been appointed to replace the one in the hospital.

This Court took particular notice of the rights of victims in the criminal justice system:

> *But in the administration of criminal justice, courts may not ignore the concerns of victims.* Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. *Morris* v. *Slappy*, ____ U. S. ____, 103 S. Ct. 1610 at 1617. (emphasis supplied).

The instant case involves a cunning and vicious plot by a husband to secretly murder his wife. Such crimes are, by definition, extremely difficult to prove. The Supreme Court of Rhode Island recognized that and said:

> . . . we believe that when one views the evidence to which we have just alluded in light of the principles enumerated earlier, the reasonable inferences drawn from such evidence support a reasonable conclusion that in late December 1979 the defendant, mindful of the ultimatum of his intended bride, decided to take matters into his own hands, one of which held a syringe containing a copious quantity of insulin, and so injected the contents of the syringe into his wife with the intent that she should expire so that he would be free to marry Alexandra. ____ R. I. at ____, 475 A. 2d at 1021.

This case involves a situation in which there was a principal victim, Mrs. von Bulow, and a subsidiary victim, the

surviving son of the principal victim. The latter, knowing the difficulty of proving that his mother was assaulted, obtained evidence directly linking the defendant to the assault of his mother, and took this evidence to a highly respected and reputable attorney, who, after arranging a private test of the evidence, turned it over to the State Police. Without this initiative on the part of the victim's son, it is highly unlikely that the defendant would have been brought to trial.

The Rhode Island Supreme Court focused on the conduct of the State Police and their re-examination of the evidence discovered and given them by the victim's son. The victim, lying comatose, was in no position to locate the incriminating evidence, have it tested, and deliver it to the State Police. Her son acted vicariously on her behalf.

The Rhode Island Supreme Court's analysis of the factual distinctions between *United States* v. *Jacobsen*, ____ U.S. ___, 104 S. Ct. 1652 (1984) and *State* v. *Eiseman*, ____ R. I. ___, 461 A. 2d 369 (R. I. 1983) is without merit. Indeed, the court below chose to resolve federal constitutional issues on the basis of its own ideological interpretation in contrast to the judicial trends of this Court.

This leads to a bifurcation of justice. Had the defendant committed his crime in a state which follows the principle that the Supreme Court of the United States is the final arbiter of the meaning of the Fourth Amendment, it is likely that his conviction would have been sustained on the basis of *Jacobsen, supra.* Whether the constable "has blundered" now depends on the geographic loci of the crime rather than on this Court's interpretation of the constitution.

The factual setting of this case is important. The defendant was knowledgeable about the toxic effects of insulin upon hypoglycemic persons, such as his wife. He had dual motives for ending her life. His behavior during the first occasion in which his wife had suffered a non-fatal cardiac arrest had

aroused the suspicions of her son. After the second episode, the stepchildren contacted attorney Richard H. Kuh. Acting on his advice, the son conducted the private search which the Rhode Island Supreme Court has conceded did not violate the Fourth Amendment.

We submit, on the facts of this case, that Claus von Bulow did not have a "reasonable expectation" in the privacy of the articles he used to attempt the murder of his wife, especially in light of his earlier suspicious conduct attending the first coma. It is as reasonable to hypothesize that the defendant knew, or should have known, that the maid or children would make an effort to search the premises jointly inhabited by them in order to confirm their suspicions.

In its expression for concern about the rights of victims, this Court stated: "Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities . . ." *Morris* v. *Slappy*, ____ U. S. at ____, 103 S. Ct. at 1617. Again, the unique factual setting of this case requires an examination of the question of just who, in the son's mind, the "proper authorities" might have been. One would surmise in a more common situation that the "proper authorities" would have been the police. If, for example, Mrs. von Bulow had been assaulted with a firearm, it is almost certain that the son would have gone immediately to the local police department. But, to one in the son's position the matter was not that simple. He was suspicious that his mother had been assaulted by secretive means, giving a superficial appearance of natural causes, by someone with the expertise to be able to create that appearance. He must tread carefully, without rousing Claus von Bulow's suspicions or risk destruction of evidence.

The son, as a private citizen, could hardly have procured a search warrant, and he might well have believed that if he *had* gone to the police, with *only* his suspicions, they would have

taken the obvious first step in a criminal investigation and interviewed (and alerted) the defendant, thus giving him the opportunity to dispose of the incriminating evidence.

The son's action at this point was eminently reasonable: he not only sought out a lawyer, but, in addition, a lawyer whose prior position as District Attorney of New York County established him as an expert in criminal law and procedure. Mr. Kuh, knowledgeable in the law, advised the son as a private party to find the evidence (which was far more available to him) and then turn it over to the authorities. This is precisely what the young man did, and the defendant's conviction resulted.

If this Court is of a mind to reconsider the "independent and adequate" state ground doctrine, relied on by the court below, then we submit that this case provides an ideal opportunity and factual setting to do so. This is particularly true in light of the Court's recent pronouncements of the weight to be given to the victims of crime. If the ruling below is allowed to stand, the victim's son, *acting on the advice of counsel,* must see his efforts voided because of a strained interpretation of the law by a state court. We believe this is especially troublesome in view of this Court's decisions in *Michigan* v. *Long,* ____ U. S. ____, 103 S. Ct. 3469 (1983) and *Colorado* v. *Nunez,* ____ U.S. ____, 104 S. Ct. 1257 (1984).

As pointed out by Chief Justice William H. Erickson in his presentation before the National District Attorneys' Association (NDAA) Summer Conference in San Diego, California, August 13, 1984 (soon to be published in The Prosecutor, the official NDAA journal) it is unlikely that this Court will accept at face value a state court's incantation of the words "independent state grounds" without looking behind them for their true import:

> In *Michigan* v. *Long,* 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983), the Supreme Court erected a formidable barrier to

a state court's granting of rights to a criminal defendant on adequate and independent state grounds. "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we . . . will not undertake to review the decision." *Long,* 103 S. Ct. at 3476. When it is not clear that a state court decision does not rest primarily on federal law, and when the opinion does not contain a "plain statement" of the adequacy and independence of its state grounds, "we merely assume that there are no such grounds." *Id.,* 103 S. Ct. at 3476.

The announced goal of the bright-line requirements set forth in *Long* was to achieve uniformity among the states in their implementation of federal constitutional rights. The High Court's decisions this term reflect the Court's continuing interest in uniformity. *Colorado* v. *Nunez,* 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984), reflects that the practical effects of *Long* may be more far-reaching than a black-letter reading of *Long* would indicate. Although the Supreme Court recognized the adequacy and independence of the state court's decision, *People* v. *Nunez,* 658 P.2d 879 (Colo. 1983), the interest in uniformity prompted three justices to reiterate the federal position on the contested issue.

There is no constitutional conflict between federal deference to the independence of state courts and the interest in uniform application of federal law. A perceived problem arises only when a state court breaks away from established federal court interpretations of the United States Constitution. *Especially when the literal text and the prior state court interpretations of a state constitution suggest a wholesale adoption of federal law, the Supreme Court is likely to view any purported adequate and independent state ground as a mere guise to avoid federal precedent.* [emphasis supplied]. *See, e.g., Ohio* v. *Johnson,* 104 S.Ct. 2536 (1984); *Oliver* v. *United States,* 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); *South Dakota* v. *Opperman,* 428 U.S. 364 (1976); *Oregon* v. *Haas,* 420 U.S. 714 (1975); *Williams* v. *Georgia,* 349 U.S. 375 (1955). The Court cannot be faulted for undertaking to resolve a conflict between settled federal law and an overly active state court. Taken

together, however, *Long* and *Nunez* suggest that the number of cases may be growing in which the Supreme Court sees a need to resolve the conflict. Erickson, "Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1983-1984," The Prosecutor, Summer 1984, p____.

We submit that the "independent state grounds" basis for the decision of the Rhode Island Supreme Court is in fact a "guise to avoid federal precedent" and that its effect in this case is to deny the victims of crime their rightful opportunity to seek justice.

CONCLUSION

If the ruling of the Rhode Island Supreme Court is permitted to stand, intolerable confusion will augment the uncertainty that already prevails with respect to the constitutional controls over law enforcement investigative procedures. In practical effect, each one of the highest courts of the 50 states will be interpreting with unreviewable finality, the *Constitution of the United States*—a responsibility that should remain where it is, within the Supreme Court of the United States.

For these reasons *amici* submit that the judgment of the Supreme Court of Rhode Island should be reversed, and that a Writ of Certiorari should issue to review that court's erroneous decision of federal constitutional issues.

Respectfully submitted:

HON. ROBERT K. CORBIN, ESQ.
Attorney General
STEVEN J. TWIST, ESQ.
Chief Assistant
State of Arizona
1275 W. Washington Street
Phoenix, AZ 85007

AUSTIN J. MCGUIGAN, ESQ.
Chief State's Attorney
State of Connecticut
100 South Turnpike Road
Wallingford, CT 06492

JAMES P. MANAK, ESQ.
Attorney at Law
33 N. LaSalle Street
Suite 2108
Chicago, IL 60602
Tel: (312) 236-3927
Counsel for Amici Curiae.

MOTION FILED
AUG 20 1984

No. 84-106 (5)

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

CLAUS VON BULOW,

Respondent.

Petition for Writ of Certiorari
To the Supreme Court of Rhode Island

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF, AND BRIEF, of Annie Laurie Kneissl and Alexander von Auersperg, on their own behalfs and on behalf of their mother, Martha von Bulow, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

RICHARD H. KUH
Attorney for Annie Laurie Kneissl and Alexander von Auersperg
555 Fifth Avenue
New York, New York 10017
(212) 972-9100

Of Counsel:
Alan E. Marder

BEST AVAILABLE COPY

25 pp

M-1

No. 84-106

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

CLAUS VON BULOW,

Respondent.

Petition for Writ of Certiorari
To the Supreme Court of Rhode Island

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Annie Laurie Kneissl and Alexander von Auersperg, the adult children of Martha ("Sunny") von Bulow, on their own behalfs and on behalf of their mother, respectfully move this Court for leave to file the accompanying brief in this case as amici curiae.

The consent of the attorney for the Petitioner, the Attorney General of the State of Rhode Island, has been obtained. The attorneys for the Respondent herein have not consented to the filing of a brief by Mrs. Kneissl and Mr. von Auersperg as amici curiae.

The Interest of the Amici

The applicants have a profound interest in this case in that the Respondent here is their step-father, the husband of their mother whom—as found by the unanimous action of

the Rhode Island trial jurors—von Bulow twice assaulted with the intent to kill. Although Rhode Island's sole appellate court set aside both counts of that conviction, while so doing it expressly noted that:

> [T]he reasonable inferences drawn from [the trial] evidence support a reasonable conclusion that in late December 1979 the defendant, mindful of the ultimatum of his intended bride, decided to take matters into his own hands, one of which held a syringe containing a copious quantity of insulin, and so injected the contents of the syringe into his wife with the intent that she should expire so that he would be free to marry Alexandra. (App. A, pp. 52-53).

Annie Laurie ("Ala") Kneissl and Alexander von Auersperg bring this motion in large part on behalf of their mother, "Sunny" von Bulow, Claus von Bulow's victim. She is now, and has long remained, completely comatose and continuously hospitalized, worse than helpless, her long lingering coma resulting from irrevocable brain damage brought on by von Bulow's second assault, that of December, 1980.

The movants here, Mrs. Kneissl and Mr. von Auersperg, have now spent more than three and a half years with the nightmare knowledge of their step-father's attempt to kill their mother; neither their own suffering nor their mother in her long enduring living death have had their roles as victims given as much as a single passing word of consideration in the lengthy decision of the Rhode Island Supreme Court (App. A, pp. 1-53). This wanton unconcern of the Rhode Island appellate court for the victims of these von Bulow crimes—and concern for victims of all crimes—is at the foundation of the instant motion.

"Sunny" von Bulow's adult children here seek leave to demonstrate to this Court that the Rhode Island Supreme

Court's application of its own novel exclusionary rule—reversing a conviction for heinous crimes because laboratory tests of pills were admitted into evidence when no search warrant had been obtained to test those pills *lawfully in police custody, and when the trial defense denied that the pills belong to von Bulow*—completely loses sight of the rights of the victims, now urged to be of Constitutional dimensions. Moreover, this Constitutional right of victims to due process, equal protection, and trial by jury was not only completely ignored by the Rhode Island Supreme Court, but it has barely been considered in the Rhode Island Attorney General's Petition for Certiorari in this case. (Certiorari Petition, pp. 19-20).

The brief of the amici herein develops the half century old concept, urged by Justice Benjamin Cardozo in *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934), that

> [J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

If the applicants' arguments, as set forth in the brief that is appended hereto, are approved by this Court, the Petition for Certiorari should be granted and, ultimately, the decision of the Rhode Island high court should be reversed.

Respectfully submitted,

Richard H. Kuh
Attorney for Annie Laurie Kneissl and Alexander von Auersperg
555 Fifth Avenue
New York, New York 10017
(212) 972-9100

Of Counsel:
Alan E. Marder

Dated: New York, N.Y.
August 20, 1984

No. 84-106

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

CLAUS VON BULOW,

Respondent.

Petition for Writ of Certiorari
To the Supreme Court of Rhode Island

BRIEF of Annie Laurie Kneissl and Alexander von Auersperg, on their own behalfs and on behalf of their mother, Martha von Bulow, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

TABLE OF CONTENTS

	PAGE
Table of Authorities	II
The Interest of the Amici	1
Summary of the Argument	3
Argument	5
A. The Rhode Island Supreme Court's Decision Setting Aside the Jury's Guilty Verdict Is So Unsound Legally, and So Unconcerned with Serious Crime and Its Victim, That It Should Not Be Allowed to Stand	5
B. America and Its Courts are Increasingly Recognizing that Victims Have Rights Entitled to Protection, Rights Completely Ignored by the Rhode Island Court's *von Bulow* Decision	9
C. Rhode Island's Appellate Court Wrongfully Invaded Rights Guaranteed by the United States Constitution to "Sunny" von Bulow and the Instant Amici	12
D. The *von Bulow* Case Affords a Unique Medium and Timely Opportunity for this Court to Place Victims' Rights on a Clear Constitutional Footing	16
Conclusion	18

TABLE OF AUTHORITIES

PAGE

Cases:

In re Application of KSTP Television for Video Tapes, 504 F. Supp. 360 (D. Minn. 1980) 11

Marbury v. Madison, 5 U.S. 137 (1803) 14
Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) 9, 16
Michigan v. Long, 103 S. Ct. 3469 (1983) 16
Montana v. Jackson, 103 S. Ct. 1418 (1983) 16
Morris v. Slappy, 461 U.S. 1 (1983) 12

New York v. Brewster, 100 A.D.2d 134 (2d Dep't 1984) 11

Press-Enterprise Company v. Superior Court of California, 104 S. Ct. 819 (1984) 13

Snyder v. Massachusetts, 291 U.S. 97 (1934) 3
South Dakota v. Neville, 459 U.S. 553 (1983) 16

United States v. Hasting, 461 U.S. 499 (1983) 13
United States v. Jacobsen, 104 S. Ct. 1652 (1984) 9
United States v. Leon, 104 S. Ct. 3405 (1984) 9, 16

Constitution and Statutes:

U.S. CONST. amend. V 13
U.S. CONST. amend. VI 14
U.S. CONST. amend. VII 14
Victims and Witnesses Protection Act, 18 U.S.C. §§ 3579-80 10

PAGE

Miscellaneous:

Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim,* 11 Pepperdine L. Rev. 63 14
Claus and Sunny, An American Tragedy, Observer Sept. 18, 1983 17
Declaration of Independence (U.S. 1776) 15
Die Frau Im Goldenen Kafig, Stern, Sept.-Oct. 1983 17
The Fatal Charm of Claus von Bulow, McCalls, Oct. 1982 17
Final Report of the President's Task Force on Victims of Crime (December 1982) 10, 11
Guilty, New York Magazine, March 29, 1982 17
23 Judges' Journal 2 (Spring 1984) 10
Kiesel, *Crime and Punishment: Victim rights movement presses courts, legislatures,* 70 A.B.A. Journal 25 (1984) 10
Mordafare Bulow; Die Millionairin Die Nicht Sterben, Bunte, June 16, 23, 30, 1983 17
Newsweek, March 14, 1983 10
11 Pepperdine L. Rev. (1984) 10
Rosenfeld, *Claus von Bulow and Shelly Levene,* 191 N.Y.L.J. 109, June 6, 1984, at 2, col. 3 8
Sleeping Beauty, New York Magazine, January 11, 1982 17
Wright, The von Bulow Affair (1983) 17

No. 84-106

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

v.

CLAUS VON BULOW,

Respondent.

Petition for Writ of Certiorari
To the Supreme Court of Rhode Island

BRIEF of Annie Laurie Kneissl and Alexander von Auersperg, on their own behalfs and on behalf of their mother, Martha von Bulow, as amici curiae, IN SUPPORT OF THE PETITION FOR CERTIORARI

The Interest of the Amici

The applicants have a profound interest in this case in that the Respondent here is their step-father, the husband of their mother whom—as found by the unanimous action of the Rhode Island trial jurors—von Bulow twice assaulted with the intent to kill. Although Rhode Island's sole appel-

late court set aside both counts of that conviction, while so doing it expressly noted that:

> [T]he reasonable inferences drawn from [the trial] evidence support a reasonable conclusion that in late December 1979 the defendant, mindful of the ultimatum of his intended bride, decided to take matters into his own hands, one of which held a syringe containing a copious quantity of insulin, and so injected the contents of the syringe into his wife with the intent that she should expire so that he would be free to marry Alexandra. (App. A, pp. 52-53).[1]

Annie Laurie ("Ala") Kneissl and Alexander von Auersperg bring this motion in large part on behalf of their mother, "Sunny" von Bulow, Claus von Bulow's victim. She is now, and has long remained, completely comatose and continuously hospitalized, worse than helpless, her long lingering coma resulting from irrevocable brain damage brought on by von Bulow's second assault, that of December, 1980.

The movants here, Mrs. Kneissl and Mr. von Auersperg, have now spent more than three and a half years with the nightmare knowledge of their step-father's attempt to kill their mother; neither their own suffering nor their mother in her long enduring living death have had their roles as victims given as much as a single passing word of consideration in the lengthy decision of the Rhode Island Supreme Court (App. A, pp. 1-53). This wanton unconcern of the Rhode Island appellate court for the victims of these von Bulow crimes—and concern for victims of all crimes—is at the foundation of the instant motion.

---

1. References herein to "App." are to the Appendix submitted with the Petition for Certiorari. References to "Tr." are to the trial transcript by volume and page.

"Sunny" von Bulow's adult children here seek leave to demonstrate to this Court that the Rhode Island Supreme Court's application of its own novel exclusionary rule—reversing a conviction for heinous crimes because laboratory tests of pills were admitted into evidence when no search warrant had been obtained to test those pills *lawfully in police custody, and when the trial defense denied that the pills belong to von Bulow*—completely loses sight of the rights of the victims, now urged to be of Constitutional dimensions. Moreover, this Constitutional right of victims to due process, equal protection, and trial by jury was not only completely ignored by the Rhode Island Supreme Court, but it has barely been considered in the Rhode Island Attorney General's Petition for Certiorari in this case. (Certiorari Petition, pp. 19-20).

The brief of the amici herein develops the half century old concept, urged by Justice Benjamin Cardozo in *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934), that

> [J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

If the applicants' arguments, as set forth in this brief are approved by this Court, the Petition for Certiorari should be granted and, ultimately, the decision of the Rhode Island high court should be reversed.

Summary of the Argument

The decision of the Supreme Court of Rhode Island, whether or not otherwise deemed to be soundly premised on adequate and independent state grounds,[2] is so unsound

2. The inadequacy is considered in the Petition for Certiorari at pp. 22-27; neither this nor other items covered in that Petition will be reconsidered herein.

in setting aside a conviction for a crime equivalent to attempted murder, as to constitute the deprivation of the developing Constitutional right of crime victims to be accorded due process of law, equal protection of the laws, and their right to have jury verdicts against criminals upheld, absent sound and reasonable grounds for setting aside such verdicts.

This emerging Constitutional right, presaged a half century ago by Justice Cardozo, is now being crystallized not only in the developing legal literature, but in both legislation and case law. It has recently enjoyed the benisons of this high Court.

If we are to "keep the balance true," as Justice Cardozo long since urged, and defendants in the criminal justice system are soundly to enjoy an entire panoply of Constitutional protections, there must co-exist at least some articulated modicum of protection for crime victims. Such protections must come into play when defendants—as in this case—would otherwise be awarded outlandishly dangerous advantages by preposterous state court action on its face so absurd as to bring dishonor and ridicule upon our American system of criminal justice.

The Rhode Island appellate court action in the instant *von Bulow* case, a case so broadly watched not only throughout America but throughout the world as to mark it as a microcosm of "justice" in America, cries out for review by the United States Supreme Court.

This is an ideal case in which this Court may choose to reaffirm unequivocally that "justice, though due to the accused, is due to the accuser also."

This is an ideal case in which this Court may declare that the due process, equal protection, and jury guarantees

are soundly invoked by crime victims, as well as by the criminally accused.

This is an ideal case in which this Court alone may announce that the several states may not—calling for whatever reasons, upon their own unique idiosyncracies—freshly mold technicalities that fail to accord with certain minimal principles of fairness to victims, and then successfully sanctify and preserve those idiosyncracies by ascribing them to "adequate and independent state grounds."

And, should this Court so determine, it is an ideal case for Supreme Court consideration of whether the recently articulated "good faith exception" should be applied to bar strained applications of the exclusionary rule, even in situations in which police acted cautiously and wholly reasonably, although no search warrants had been sought or obtained.

ARGUMENT

A. The Rhode Island Supreme Court's Decision Setting Aside the Jury's Guilty Verdict Is So Unsound Legally, and So Unconcerned with Serious Crime and Its Victim, That It Should Not Be Allowed to Stand

The majority of the Rhode Island high court, in expressing its disagreement with its own Chief Justice's partial concurrence and partial dissent,[3] expressly ruled that, in this circumstantial case, "the reasonable inferences drawn from [the trial] evidence support a reasonable conclusion that in late December 1979 [the time of the first murderous assault] the defendant . . . decided to take matters into his own hands, one of which held a syringe containing a copious

3. Chief Justice Bevilacqua would have gone even further than his brethren, and would have *dismissed* the *first* count of the indictment: App. A, pp. 53-58.

quantity of insulin" and tried to gain his marital freedom by trying to kill his wife. (App. A, pp. 52-53).

The summation by the state appellate court of the trial evidence (App. A, pp. 1-11) itself demonstrates that the trial evidence of guilt concerning the *second* count of the indictment—that charges the attempt on Mrs. von Bulow's life of December 1980—is even stronger, more persuasive, than the evidence concerning the 1979 coma.

Despite this strength of the evidence on both counts, in reversing the Rhode Island court expressly noted that the black bag and all its contents—including the pills—was lawfully in the custody of the Rhode Island State Police at the time that the State Police had laboratory tests performed on the pills. (App. A, pp. 31-32). Yet that court reversed because of the absence of a search warrant prior to the performance of those analyses which were received into evidence at the trial.[4]

A critical point that was *not* fully considered within the space limitations of the Certiorari Petition, was that the

4. We will not reargue here the propriety of the performance of the laboratory tests without a search warrant. That has been fully considered in the Certiorari Petition, pp. 10-20. Obviously, recognizing that its decision was inconsistent with sound federal precedent, the Rhode Island court went out of its way to place its reversal on so-called "adequate and independent state grounds." (App. A, pp. 47-51). That claim, too, has been analyzed in the Certiorari Petition, pp. 22-27, and will not here be reviewed.

Nor do we here review the harmlessness of the error, if—*arguendo*—error might be deemed to have been committed. (See Certiorari Petition, pp. 20-22). Clearly the critical evidence in the case, found in the same black bag with the pills, was the used hypodermic needle and the lab tests that reflected the presence of insulin and barbiturates on that needle. These were among the critical items of evidence against von Bulow in this trial, and they were ruled by Rhode Island's appellate court to have been properly admitted in evidence. (App. A, pp. 31-32). In contrast, the pills, and the lab tests on the pills, were of no significant importance.

Rhode Island Supreme Court's after-the-fact demand for a search warrant, to justify the pill laboratory tests, served to protect *no significant defense interest.*

Although Claus von Bulow chose not to testify in the course of his own trial, the trial defense repeatedly urged that the black bag and its contents—including the pills—were not his property. This absorbed a portion of the cross-examination of the two key non-medical witnesses, "Sunny" von Bulow's adult son Alexander von Auersperg (one of the amici here), and "Sunny" von Bulow's personal maid of some twenty years' standing, Maria Schrallhammer. (Tr. VII, pp. 191-206; Tr. IX, pp. 594-96, 615-32, 696-97). Indeed, among the few witnesses produced by the defense at the trial was one Marshall D. Salzman, a locksmith; the entire purport of his disputed direct testimony was clearly designed to suggest that the black bag had *not* been found in von Bulow's closet, but was improperly concocted in some fashion by the prosecution and/or prosecution witnesses. (Tr. XX, pp. 3021-35). Further, in the course of his eloquent summation, defense trial counsel Herald Price Fahringer urged, at considerable length, that the black bag and its contents had *not* been inexorably linked to von Bulow and may well have been Sunny's. (Tr. XXV, pp. 3614-24). Unequivocally, Fahringer urged, *inter alia:*

> Now, if there's one thing I ask you to discuss when you go into your Jury Room, I ask you to discuss that, because that's the case; who handled that? Mr. von Bulow was never seen, never seen with that bag in his possession, never seen with it in his hand, never seen in his study, never seen anywhere near him, except in that canvas bag and in a black bag of his. All evidence points towards the fact that he never touched or had any of those things. (Tr. XXV, p. 3620).

The defense having in these divers fashions urged throughout the trial that the black bag and all of its con-

tents were *not* the property of the defendant von Bulow, it is difficult to fathom how *his* rights would have been more soundly protected had Rhode Island's now new, unique, and strange rule, requiring search warrants before laboratory tests may be performed, existed at the time that those tests were in fact performed. On whom was such warrant —had one been obtained—to have been served? The evidence was lawfully in State Police custody, and at trial von Bulow made every effort, short of testifying, to distance himself from any connection with the black bag's contents.

Commenting on Rhode Island's action, New York trial lawyer Mordecai Rosenfeld—a perceptive observer and legal essayist who had had absolutely no connection whatsoever with this trial, the parties, or counsel—writing in the New York Law Journal, noted:

> Again, we will not explore the fine points of the Constitution because there is an overwhelming point that makes the Court's holding so weak: The defense maintained throughout the trial that the black bag belonged *not* to the defendant, but to the comatose victim, Mrs. Martha von Bulow. It tried (unsuccessfully) to convince the jury that Mrs. von Bulow had injected herself with the fatal dosages. Since Claus has claimed throughout that the black bag was Martha's, how could he also claim that *his* Constitutional rights had been violated when the police later sent some of its contents for chemical analysis without a search warrant? The Rhode Island Supreme Court never explains what seems to be a monumental inconsistency.

Rosenfeld, *Claus von Bulow and Shelly Levene*, 191 N.Y.L.J. 109, June 6, 1984 at 2, col. 3.

And so Rhode Island, in order to reverse this conviction for heinous crimes, not only fashioned its own unique ruling, obviously inconsistent with federal law that had

been clearly articulated earlier the same month by this Court in *United States* v. *Jacobsen*, 104 S. Ct. 1652 (1984), but fashioned a rule that protected no interests that the defense had articulated or asserted during the trial.

In so doing, it expressed complete disregard for the rights of the prime victim, "Sunny" von Bulow, and no concern over the anguish caused to her next of kin, the amici here. Not only, if the Rhode Island decision is permitted to stand, will Alexander von Auersperg and his sister, Ala Kneissl, be forced to endure the continued exacerbation experienced by grieving for their comatose and long hospitalized mother, while her would-be killer walks free, but this exacerbation will be intensified by the spectre of once again going through a long and arduous trial, uncertainty remaining as to what the Rhode Island high court may again do the second time around, assuming it is given another crack at another von Bulow jury guilty verdict.

Respectfully, the instant *von Bulow* case is one that this Court may deem appropriate for consideration of some modest extension of the recently articulated "good faith exception" to the exclusionary rule, to apply it to some non-search warrant situations. *See United States* v. *Leon*, 104 S. Ct. 3405 (1984) and *Massachusetts* v. *Sheppard*, 104 S. Ct. 3424 (1984).

B. America and Its Courts are Increasingly Recognizing that Victims Have Rights Entitled to Protection, Rights Completely Ignored by the Rhode Island Court's *von Bulow* Decision

The so-called science of "victimology"—which has spawned its own quarterly magazine "Victimology: An International Journal"—has been rapidly developing during the past decade or two.

At least thirty-nine states now have victims compensation programs, fifteen have laws requiring their courts to

consider victim impact statements prior to sentencing, and at least three states (Arizona, California and Connecticut) allow victims to address the court at the time of sentencing. *See* Kiesel, *Crime and Punishment: Victim rights movement presses courts, legislatures,* 70 A.B.A. Journal 25 (1984).

Two national groups have emerged to champion the rights of victims: the National Organization for Victim Assistance ("NOVA"), and the Victims Assistance Legal Organization ("VALOR").

In April 1982 President Ronald Reagan established the President's Task Force on Victims of Crime which rendered its final report in December of that year. *See Final Report of the President's Task Force on Victims of Crime* (December 1982).

The United States Department of Justice has established a Victims of Crime Management Team, and the United States Congress passed the Victims and Witnesses Protections Act, 18 U.S.C. §§ 3579-80, which was enacted into law in 1982.

Prestigious national legal publications currently carry extensive symposia on various aspects of victim protection. *See* 23 Judges' Journal 2 (Spring 1984) and 11 Pepperdine L. Rev. (1984). Even general circulation magazines for lay readers have stressed the sound development of concern for victims and the rights of victims. *See, e.g.,* Newsweek, March 14, 1983, at 51.

Troubled concern throughout America over child abuse is still another example of today's recognition that victims and their rights—indeed, victims within family units—have too long been neglected in this nation's administration of criminal justice.

Several courts have noted that, in criminal cases, victims are entitled to special protection. Thus, in the case of *In Re Application of KSTP Television for Video Tapes,* 504 F. Supp. 360 (D. Minn. 1980), a federal district judge denied a television station access to video tapes that had been made by a criminal defendant in the course of his rape of his victim. Although the tapes were received in evidence, the court denied the TV station access to them, noting that it would "expose [the victim] to public humiliation and degradation."

Somewhat analogously, although on milder facts, an intermediate New York State appellate court in *New York v. Brewster,* 100 A.D.2d 134, 142-43 (2d Dep't 1984), rejected a defense contention that grand jury proceedings should not be premised upon photographic identification. So doing, the court stated:

> We are mindful also of the additional burden that would be placed upon victims and witnesses were they required to view a lineup in all cases prior to appearing before the Grand Jury. In the absence of any meaningful protection to the accused, the imposition of such burden is to be avoided. [Citations omitted].

Against this background of deep concern for the rights of victims, the 1982 *Final Report of the President's Task Force on Victims of Crime, supra,* at 24-28, expressly recommended the *complete* abolition of the exclusionary rule as applied to Fourth Amendment issues. Although amici do not here suggest the rule's complete abolition, certainly the straining indulged in by the Rhode Island appellate court to exclude the laboratory reports on a few pills, and to reverse on such an exclusionary basis, should not be allowed to stand.

C. Rhode Island's Appellate Court Wrongfully Invaded Rights Guaranteed by the United States Constitution to "Sunny" von Bulow and the Instant Amici

When state courts go haywire and then purport to insulate indefensible decisions by neatly worded assertions of purported "adequate and independent state grounds," a federal Constitutional concept of victims' rights should come into play giving the federal judiciary the power and mandate to step in. The *von Bulow* case clearly presents an ideal medium through which such crystallization of federal Constitutional rights of victims might begin.

This Court has demonstrated its own profound victim oriented concerns. In *Morris* v. *Slappy,* 461 U.S. 1, 14-15 (1983), this high Court reversed the 9th Circuit's grant of a habeas corpus writ to a convicted state defendant. So doing, the decision expressly noted:

> Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. But, in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. . . . The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Shortly after its decision in *Slappy*, this Court once again dealt with victims' rights in *United States* v. *Hasting*, 461 U.S. 499 (1983). In that case, this Court again reversed a circuit's vacatur of a conviction, expressly noting, at 507 and 509:

> As we shall see below, the Court of Appeals . . . did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.
>
> * * *
>
> Here, the Court of Appeals, while making passing reference to the harmless error doctrine, did not apply it. Its analysis failed to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other.

See also Press-Enterprise Company v. *Superior Court of California*, 104 S. Ct. 819, 820 (1984).

No reason appears why the Fifth Amendment guarantee, "nor shall any person . . . be deprived of life, liberty or property without due process of law," should not be adapted to protect victims as well as criminal defendants. Certainly, "Sunny" von Bulow, comatose, insensible to all life around her, completely unable to talk, to see, to smell, to hear, essentially in an endless sleep, has been effectively deprived of any meaningful "life." Her "liberty" is limited to a continuum of slumber within the four corners of her hospital bed. "Property" can no longer have any meaning for her.

As von Bulow's crimes have effectively deprived her of meaningful "life," "liberty" and "property," and Rhode

Island's appellate court has vitiated that justice that the trial jury awarded by its "guilty" verdict—and has done so on an unsound basis—so doing, it has joined in denying the prime victim, "Sunny" von Bulow, "due process of law." In *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803), Chief Justice Marshall noted:

> The very essence of civil liberty certainly consists in the right of *every* individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. (Emphasis added).

By reversing the conviction of Claus von Bulow—a conviction reached by an impartial jury—on frivolous grounds, the Rhode Island Supreme Court, and the State of Rhode Island, have not afforded "Sunny" von Bulow the protection due her. They are thereby partners in Claus von Bulow's deprivation of her "life, liberty and property." *See also* Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 Pepperdine L. Rev. 63, 77-84 (1984) (Victims are entitled to "equal protection of law").

Although the Sixth Amendment expressly focuses on the rights of "the *accused*" in assuring trial by jury, arguably at least a negative pregnant may suggest that when a criminal jury verdict of "guilty" is set aside on a mere whimsical basis, those victimized by the crime have been deprived of their corollary right to have the jury verdict govern. Indeed, the Seventh Amendment expressly provides that in *civil* suits "no fact tried by a jury shall be otherwise reexamined" except "according to the rules of the common law." Logically can a lesser standard be deemed to govern—scrapping the "rules of the common

law" and substituting absurdities—when life itself is involved, not merely a civil claim for some twenty or more dollars![5]

The formal recognition of minimal Constitutional standards of protection for crime victims will not disalign the federal system. States will not be compelled to adopt uniformity, conforming in all details to standards governing in the federal courts. There would simply be certain minimal standards of victim protection below which states would not be permitted to fall. The existence of such minima will eliminate unreasonable court constituted deviations as in the instant case, that are tragically unjust to victims and next of kin, and which hold our system of justice up to ridicule.

Federal intervention, asserting the Constitutional rights of crime victims, will prevent renegade states from insulating their own aberrant behavior from federal review by purporting to rest their decisions on "adequate and independent state grounds." This will give added credibility to the American system of criminal justice, and—preventing only wholly unreasonable pro-defendant state court action—will neither reduce the necessary and reasonable protections here afforded the accused nor convert state courts into mere lackeys of our federal judiciary.

---

5. This Court may even wish to consider whether the deep concern for "Life, Liberty and the pursuit of Happiness," heralded by our forefathers in the Declaration of Independence, may enjoy a special niche, one even more hallowed than that of the Constitution's Bill of Rights. "Sunny" von Bulow has clearly been deprived, by Claus von Bulow's surreptitious injections, of all meaningful "Life, Liberty and the pursuit of Happiness." And so victims of such heinous crimes as involve those fundamental deprivations may have special claim, as victims, to protections that, in some instances, will outweigh strained applications of defendants' Bill of Rights protections.

D. The *von Bulow* Case Affords a Unique Medium and Timely Opportunity for this Court to Place Victims' Rights on a Clear Constitutional Footing

This case reaches this Court at a time of confluence of four factors:

(i) In order to avoid the impact of potential federal review and reversal, state courts are increasingly purporting to rest their decisions upon "adequate and independent state grounds," as the Rhode Island Supreme Court did here. See actions of this Court concerning more primative efforts, as in *South Dakota* v. *Neville*, 459 U.S. 553 (1983); *Montana* v. *Jackson*, 103 S. Ct. 1418 (1983); *Michigan* v. *Long*, 103 S. Ct. 3469 (1983). *See also* Certiorari Petition, pp. 22-27.

(ii) A "good faith exception" to the exclusionary rule has emerged. *See United States* v. *Leon*, *supra*, and *Massachusetts* v. *Sheppard*, *supra*. It has not eliminated that rule, and may even have strengthened it by weeding out *some* of the exclusions involving good faith police action, while leaving the rule operative when there is clear and willful police misconduct.

(iii) As noted hereinabove (Point "B"), there is vastly increasing legal and lay support for victims' rights.

(iv) This Court in several 1983 decisions, demonstrated its profound concern that victims not be treated as the waste product of our criminal justice system, as noted hereinabove (Point "C").

This confluence suggests the propriety of the clear articulation *now* of Constitutional rights of victims, rights to be

balanced against—and occasionally to override—purported rights of defendants. This is, clearly, "an idea whose time has come. . . ."

Equally clearly, the *von Bulow* case presents the proper vehicle for such expression.

Claus von Bulow's trial has, understandably, with its combination of attempted murder, sex and adultery, scientific evidence, greed and wealth, attracted worldwide attention.[6] And so express recognition by this Court of Constitutional rights of victims would not only protect von Bulow's victims, but would reassure victims throughout America, and the populace generally, that irresponsible state court action, vitiating sound jury verdicts, will be subject to federal court review.

---

6. *See, e.g., Die Frau Im Goldenen Kafig,* Stern, Sept.-Oct. 1983; *Mordafare Bulow; Die Millionairin Die Nicht Sterben,* Bunte, June 16, 23, 30, 1983; *Claus and Sunny, An American Tragedy,* Observer, Sept. 18, 1983; *The Fatal Charm of Claus von Bulow,* McCalls, Oct. 1982. Post conviction, von Bulow—who did not testify on trial—voluntarily appeared for a pre-sentence interview, declaring his innocence to Barbara Walters on television on ABC's "20/20" on April 22, 1982. New York Magazine had run two cover stories, one pre-trial, *Sleeping Beauty,* on January 11, 1982, and one post-conviction, *Guilty,* on March 29, 1982. A widely selling book about the trial, its precursors and its aftermath, William Wright's "The von Bulow Affair" appeared in hard cover in 1983 and in paperback this year. That book notes, *inter alia,* at 2-3, that more than 140 journalists, television cameramen, newscasters, and television technicians were in attendance at Newport's courthouse throughout the trial.

Conclusion

For the reasons set forth above, as well as in the Certiorari Petition submitted by the Attorney General for the State of Rhode Island, this Court should grant Certiorari to review that action of Rhode Island's Supreme Court that set aside the jury verdict of "guilty" rendered against Claus von Bulow in March of 1982.

Respectfully submitted,

RICHARD H. KUH
Attorney for Annie Laurie Kneissl and Alexander von Auersperg
555 Fifth Avenue
New York, New York 10017
(212) 972-9100

Of Counsel:
Alan E. Marder

Dated: New York, N.Y.
August 20, 1984

Supreme Court, U.S.
FILED
SEP 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-106

In The

Supreme Court of the United States

October Term, 1984

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

vs.

CLAUS VON BULOW,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

DENNIS J. ROBERTS, II
Attorney General of the
State of Rhode Island

THOMAS M. DICKINSON
Special Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

Pages

TABLE OF CASES i

ARGUMENTS:

I. Respondent's Treatment of the State Law Issue Is Designed to Mislead the Court. 1

II. Respondent's Brief Misrepresents the State Court's Disposition of the Evidentiary Privilege Issue. 4

III. Respondent Improperly Attacks the Jury's Verdict. 5

IV. Respondent Eschews Any Privacy Interest in the Black Bag or its Contents. 7

CONCLUSION 10

TABLE OF CASES

Abie State Bank v. Bryan, 282 U.S. 765, 773 (1931) 2

Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979) 9

Chapman v. California, 386 U.S. 18 (1967) 3

Florida v. Gans, No. 83-409 (Dist. Ct. App. July 19, 1984) 10

Herb v. Pitcairn, 324 U.S. 117, 126 (1945) 2

Louisiana v. Gentry, No. 84-k-162 (La. Ct. App. May 15, 1984) 10

Martin v. Hunter's Lessee, 1 Wheat. 303 (1816) 1

Murdock v. City of Memphis, 87 U.S 590, 634 (1873) 2

Nix v. Williams, 104 S.Ct. 2501, 2509 n.4 (1984) 3

State v. Beaulieu, 116 R.I. 575, 359 A.2d 692 (1976) 4

State v. Benoit, 417 A.2d 895 (R.I. 1980) 3, 4

State v. Lemon, 256 A.2d 262, 264 (R.I. 1983) 4

State v. Robalewski, 418 A.2d 817 (1980) 3

TABLE OF CASES—Continued

Pages

United States v. Jacobsen, 104 S.Ct. 1652 (1984) 8, 9, 10

United States v. Leon, 104 S.Ct. 3405, 3413 (1984) 8

Williams v. Georgia, 349 U.S. 375, 399 (1955) 2

I. Respondent's Treatment Of The State Law Issue Is Designed To Mislead This Court

von Bulow bases his attack upon the Petition for Certiorari on the presumption that this Court lacks jurisdiction to issue a writ. The core of von Bulow's argument is the baseless allegation that Petitioner has misrepresented both the law and facts in an attempt to deceive this Court. A reading of von Bulow's brief in opposition reveals that if anyone is attempting to mislead this Court it is not the Petitioner—it is von Bulow himself.

Lest there be any doubt, the Petitioner recognizes the right, power, and authority of any state court to base its judgments upon principles of state law. Petitioner does not gainsay this important component of our federalism. Petitioner also recognizes the important corollary, however, which von Bulow ignores in his subtle attempt to distract this Court: it is the role of this Court to determine when and whether a proffered state law theory adequately and independently supports the judgment of the state court. In this regard von Bulow's pious invocation of "state's rights" constitutes an attempt to divert this Court from its important role as arbiter of the overlapping —sometimes antagnostic—interests at work in our federal system. Whatever the independence and autonomy of the states in our federal system, the federal constitution preserves this Court's jurisdiction to correct State Court judgments based upon erroneous decisions of federal law.

In implementing its role as the final arbiter of federal law this Court has long recognized that issues of federal law arising in actual cases may frequently be intertwined with related issues of state law. *See Martin v. Hunter's Lessee,* 1 Wheat. 303 (1816). In such cases, where the state law issues "are not of such controlling influence on the whole case that they are alone sufficient to support

the judgment," *Murdock v. City of Memphis*, 87 U.S. 590, 634 (1873), this Court will take jurisdiction to review the errors of federal law. To the extent that the state court incorrectly adjudges federal rights, it is the province of this Court to examine and to correct the state court judgment. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

The essential preliminary jurisdictional question is whether the asserted state law ground sufficiently supports the lower court judgment. The answer to this question is undeniably a matter of *federal* constitutional law that must be determined by this Court:

> "[T]he federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the State court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931).

See Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting) (state courts cannot invoke state principles to evade federal law; even colorable state decisions must give way when they interfere with federal principles).

Despite von Bulow's misleading characterization of the issues in this case, Petitioner in no way disparages the power of a state court in our federal system to render judgments based on state law. Petitioner merely submits that in this case the state court did not base its judgment on an adequate, independent state law foundation. The exclusively federal basis for the judgment is abundantly clear from a reading of the court's opinion; the Rhode Island court held that purported errors of *federal* law mandated that "defendant's conviction must be reversed." App. at 47. Conversely, the state court's discussion of state law led not to a reversal of the conviction but only

to a collateral reason for the suppression of certain evidence. The court neither stated nor implied that state law required reversal of von Bulow's conviction. Such a judgment of reversal could only be based, under *Rhode Island state law*, upon a finding that the failure to suppress was *both* erroneous *and* harmful under the appropriate state standard.[1] *State v. Benoit*, 417 A.2d 895 (R.I. 1980); *cf. Nix v. Williams*, 104 S.Ct. 2501, 2509 n.4 (1984) (harmless error analysis is necessary to ensure that convictions are set aside only for errors that have a measurable effect on the trial). Respondent's misleading allegations to the contrary nothwithstanding, a reading of the state court's opinion clearly reveals that the court never undertook such a state law harmless error analysis.[2] It

---

[1] von Bulow desperately attempts to convince this Court that the Rhode Island Supreme Court actually undertook a state law harmless error analysis. Resp. Opp. at 14. von Bulow concedes that the only harmless error discussion in the opinion appears in the court's discussion of federal law. *Id.* The cases cited by the state court are federal cases, *e.g., Chapman v. California*, 386 U.S. 18 (1967) or Rhode Island cases involving strictly federal precedents. *E.g., State v. Robalewski*, 418 A.2d 817 (1980). The *von Bulow* court specifically described *Robalewski*, for example, as a case involving the *federal* harmless error rule. App. at 35. As if conceding the failure of the state court to support its judgment with state law, von Bulow attempts to fill the gap by concocting an analysis that von Bulow considers desirable. Resp. br. 16-18. von Bulow is essentially asking this Court to infer an interpretation of state law that simply does not exist on the face of the state court's opinion. Ironically it is von Bulow, not Petitioner, who thus asks this Court to create an interpretation of *state* law that defeats its jurisdiction. Petitioner suggests that such an exercise is an unnecessary intrusion into the interpretation of state law. Rather than meet von Bulow's argument with a lengthy exposition of relevant state cases, *e.g., State v. Benoit*, 417 A.2d 895 (R.I. 1980), Petitioner merely suggests that von Bulow's concession that the state court failed to address these points clearly demonstrates that the lower court's judgment is not supported by an adequate state law bases.

[2] Petitioner hesitates to draw this Court into a discussion of state law. Nevertheless, von Bulow's misrepresentation of

(Continued on following page)

is therefore clear that the asserted state law basis fails to support the state court's judgment. Accordingly, this Court has jurisdiction to grant a writ of certiorari.

II. Respondent's Brief Misrepresents The State Court's Disposition Of The Evidentiary Privilege Issue

von Bulow falsely claims that the Rhode Island Supreme Court found a separate evidentiary privilege issue "dispositive" of his conviction. Resp. Opp. at 6-7. In fact, the court held that it would have remanded the case for further proceedings on this issue. The court specifically stated that this remand was "precluded" by the court's disposition of the search and seizure issue. App. at 31. In view of the court's clear and unambiguous statement that the only issue requiring reversal of the conviction was the Fourth Amendment claim, App. at 31, von Bulow's representation that the evidentiary matter was "dispositive" is manifestly false.[3]

(Continued from previous page)

Petitioner's arguments requires a brief exposition of Rhode Island appellate jurisprudence. von Bulow implies that the court intended to base its judgment on state law and that Petitioner subverts the state court's purpose and federalism itself by seeking review in this court. Petitioner seeks nothing of the kind. Rather, petitioner suggests that the Rhode Island Supreme Court simply failed to support its judgment with an adequate and independent state law basis. The Rhode Island court was well aware that to do so would require a state law harmless error analysis. *See, e.g., State v. Benoit,* 417 A.2d 895 (R.I. 1980). Petitioner suggests that the court's discussion of the non-dispositive state constitutional issue was consistent with the Rhode Island Supreme Court's well-known practice of discussing on direct appeal significant non-dispositive issues that are likely to arrise in later proceedings of the same and other cases. *See, e.g., State v. Lemon,* 256 A.2d 261, 264 (R.I. 1983) (when new trial granted, court may discuss other non-dispositive issues that are likely to arise again); *State v. Beaulieu,* 116 R.I. 575, 359 A.2d 692 (1976) (non-dispositive issues will be discussed by court in cases where new trial has been ordered and issues may arise in future).

[3] The within petition does not question the propriety of a remand for further inquiry regarding the evidentiary privilege

(Continued on following page)

III. Respondent Improperly Attacks The Jury's Verdict

Accusing Petitioner of misrepresenting the facts of the case, von Bulow proceeds to argue to this Court that the facts at trial support his innocence. This cynical attempt to impeach the verdict of the jury is especially ironic in light of the Rhode Island Supreme Court's adamant rejection of von Bulow's evidentiary insufficiency argument.[4] If von Bulow seriously questioned the sufficiency of the evidence to prove his guilt, he could have cross-petitioned for certiorari and asked this Court to review the evidentiary record. Instead, he waives this issue, seeking by subterfuge to attack the jury's verdict and the Rhode Island Supreme Court's condemnatory view of the extensive evidence of his guilt.

As if this were not enough, von Bulow's appellate counsel actively misleads this Court with a fictitious account of facts allegedly suggesting his innocence. Resp. Opp. at 4-5 n.4. Because von Bulow's factual deceptions are subtle and calculated, Petitioner cannot, in the limited space available, refute them all. A few examples must suffice. For instance, von Bulow attemtps to show his

---

(Continued from previous page)

issue. Indeed, Petitioner recognizes that if this Court grants the writ and reverses the judgment of the Rhode Island Supreme Court, this Court would then likely remand the case directly to Newport Superior Court for disposition of the evidentiary privilege issue. This limited remand would focus only upon the narrow question whether certain allegedly privileged materials are actually entitled to the protection of privilege. The trial judge would also be required to determine whether any relevant evidence is contained within the documents. von Bulow's mendacious characterization of this issue as "dispositive" of his conviction can only be intended to mislead this Court.

[4] The Rhode Island Supreme Court concluded that the evidence supported a conclusion, beyond a reasonable doubt, that von Bulow had taken a syringe containing insulin and "injected the contents of the syringe into his wife with the intent that she should expire . . ." App. 53.

loving concern for his wife's health with the following assertion:

> "On four or five occasions when Martha von Bulow was critically ill during 1979 and 1980, Claus von Bulow was the first to call the doctor." Resp. Opp. at 4.

This statement is misleading, because one of the cited occasions was von Bulow's first attempt to murder his wife. Mrs. von Bulow remained comatose for many hours while von Bulow steadfastly refused to seek medical help. von Bulow finally capitulated and summoned a doctor, but only after Mrs. von Bulow's maid expressed her suspicions and threatened to call the doctor herself. On another occasion cited to show his concern for his wife, von Bulow in fact had failed to telephone Mrs. von Bulow's personal physician. This doctor later testified that he could have treated Mrs. von Bulow at home, but her husband, by calling another doctor instead, transported her to a different hospital where she was prevented from seeing her personal physician for many hours. (Tr. XVII-2310).

von Bulow thus renews his clever attempts to appear the devoted husband while actually interfering with the medical care of his wife. This approach is consistent with his active campaign to slander his wife and impede her recovery by distorting her medical history.[5] Despite the

---

[5] See Resp. Opp. at 4 n.4. Testimony at trial exposed von Bulow's carefully orchestrated plot to convince his wife's physicians that she was an alcoholic who abused barbituates. For example, von Bulow told the family physician, Dr. Stock, that his wife's first coma was caused by alcoholism. (Tr. XVII-2300). This claim was also made to the physician treating Mrs. von Bulow in Newport. (Tr. XV-1709-11). In fact, laboratory tests at Newport Hospital revealed that upon admission Mrs. von Bulow's alcohol and barbituate levels were negative. (Tr. XV-1728-29). Her personal physician, who is an expert in alcoholism, testified that in twenty-six years of treatment his patient had displayed none of the clinical signs of alcoholism. (Tr.

(Continued on following page)

jury's obvious disbelief of this subterfuge, von Bulow persists in his attempt to mislead this Court.

Another example of von Bulow's cavalier attitude toward the facts is his vague allegation that "mistakenly" identified items would prove that the black bag belonged to his wife. Resp. Opp. n.4. This is clearly contradicted by the fact that in February of 1980, when Maria Schrallhammer first observed the bag, she saw a prescription bottle in the name of Leslie Baxter—a name unknown to Maria. (Tr. VIII-366-67). von Bulow *stipulated* at trial that these drugs had been given to *him*—not to his wife—by Ms. Leslie Baxter, a female associate of von Bulow's. (Tr. XX-2988). This conceded confirmation of Maria's observations both supports her credibility and refutes von Bulow's present innuendo that the black bag belonged to his wife.

Given von Bulow's concession that he no longer challenges the sufficiency of the evidence against him, Resp. Opp. at 3, his contorted account of the facts is especially inappropriate. Petitioner is confident that this Court will not permit him to benefit from these distortions.

IV. Respondent Eschews Any Privacy Interest In The Black Bag Or Its Contents

Perhaps the most remarkable aspect of von Bulow's opposition to certiorari is his brief's deafening silence regarding his privacy interest. Nowhere in the twenty-four page document does von Bulow even suggest that he had a reasonable expectation of privacy in either the black bag or its contents. It is replete with repudiations of any

---

(Continued from previous page)

XVII-2285-2292). Moreover, two of von Bulow's *own defense witnesses*, the butler at Clarendon Court and the family chauffeur, testified that they had never seen Mrs. von Bulow drink to excess. (Tr. XX-3051, 3066, 3101). In the face of this extensive evidence that von Bulow's claims of his wife's alcoholism were false, he persists in his attempts to deceive this Court.

privacy interest in the black bag. For example, at one point von Bulow suggests that all members of the household had free and equal access to the bag. Resp. Opp. at 4 n.4. Such an assertion defeats von Bulow's personal privacy claim. More important, it confers upon Alexander—the person who provided the bag to police—an apparent right to consent to the chemical tests conducted by police. This view of the facts, of course, obviates the need for a search warrant. Later in his brief von Bulow implies that when Alexander delivered the bag to Sgt. Reise, the police should not have believed that the bag belonged to von Bulow. Resp. Opp. 6 n.4. This duplicitous position chastises the police for even suspecting that the bag belonged to von Bulow; at the same time von Bulow criticizes the police for failing to protect his expectation of privacy—an expectation of privacy that he seeks now to abandon! Given this *reductio ad absurdum* of von Bulow's argument, application of the exclusionary rule in this case invites public mockery of the law and the administration of justice. *See United States v. Leon*, 104 S.Ct. 3405, 3413 (1984) (indiscriminate application of exclusionary rule invites public disrespect for law).

In support of his claim that the Rhode Island Supreme Court properly applied *Jacobsen*, von Bulow quotes at length from the Rhode Island court's opinion. Opp. 20-21. *Jacobsen*, of course, requires a reviewing court to evaluate police conduct in light of prior private conduct. The Fourth Amendment comes into play only to the extent that the private search leaves uncompromised some cognizable privacy interest. von Bulow suggests that his expectation of privacy remained intact despite the private search. In making this argument von Bulow notes that the Rhode Island court placed great importance upon Sgt. Reise's purported ignorance of two

items found in the black bag—papaveretum and lidocaine. Reise's alleged ignorance regarding these substances is proffered to show that von Bulow had some lingering privacy interest that was infringed by testing that confirmed the identity of these items. Rather than supporting von Bulow's position, however, this lengthy quotation from the opinion vividly reveals the Rhode Island court's misapplication of *Jacobsen* to the facts of this case. Uncontradicted testimony showed that both the lidocaine and papaveretum were *clearly labelled* as such. (Tr. IV-667-668). A labelled item plainly declares its contents. Because private parties and police alike had clearly inferred the identity of the contents from outward appearances, the papaveretum and lidocaine supported no reasonable expectation of privacy. *See Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979). Moreover, von Bulow's trial counsel *conceded* that Reise was free to examine items and to read their labels *without implicating any Fourth Amendment rights. See* Pet. at 12 n.6. Clearly, under proper Fourth Amendment analysis these items supported no expectation of privacy. That the *von Bulow* court focused upon these substances—items that von Bulow himself essentially *conceded* supported no expectation of privacy—demonstrates the court's misapplication of *Jacobsen* to the facts of this case. Presumably, this is the best support von Bulow can find for his claim that the court below adequately applied the principles enunciated by this Court in *Jacobsen*. Petitioner submits that the quotation shows exactly the opposite and provides an ample basis for this Court to exercise certiorari jurisdiction.[6]

---

[6] The jurisdiction of this Court is based, in part, upon Petitioner's claim that the Supreme Court of Rhode Island decided this case in conflict with the decisions of high courts of other States. Pet. at 2 & n.2. In addition to those cases cited

(Continued on following page)

CONCLUSION

For the foregoing reasons, and for such other reasons as appear on the Petition for Certiorari, the State of Rhode Island and Providence Plantations prays that a writ of certiorari issue to the Supreme Court of Rhode Island.

STATE OF RHODE ISLAND

By its Attorney

DENNIS J. ROBERTS, II
Attorney General

THOMAS M. DICKINSON
Special Assistant
Attorney General
72 Pine Street
Providence, RI 02903

(Continued from previous page)

in the Petition, Petitioner wishes to apprise this Court of two state cases decided after *United States v. Jacobsen*, 104 S.Ct. 1652 (1984). In *Florida v. Gans*, No. 83-409 (Dist. Ct. App. July 19, 1984), the trial court suppressed the results of a chemical analysis conducted by police. The defendant had been a patient in a hospital emergency room, where admitting personnel removed items from his pockets, including a vial containing white powder. Suspecting illicit drugs, the hospital summoned the police and a chemical test was conducted, which confirmed the presence of cocaine. The court held that the private observations by hospital officials had so vitiated defendant's privacy interest that the subsequent warrantless police chemical test was permissible. In *Louisiana v. Gentry*, No. 84-k-162 (La. Ct. App. May 15, 1984), the employees of a freight carrier observed a suspicious package which, when opened, revealed a plastic tape cassette cartridge filled with white powder. Police were summoned and chemical tests ensued. The Court concluded that the private observation of the powder substantially compromised defendant's expectation of privacy. The subsequent chemical analysis therefore implicated no Fourth Amendment rights. Petitioner submits that the Rhode Island Supreme Court's decision in *von Bulow* conflicts with the holdings of these cases. As such, they provide a basis for certiorari pursuant to Sup. Ct. R. 17.